SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1096.

THE UNITED STATES, APPELLANT,

VS.

JOHNSON BLACKFEATHER, THE PRINCIPAL CHIEF OF THE SHAWNEE TRIBE OF INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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1 IN THE COURT OF CLAIMS.

JOHNSON BLACKFEATHER, THE PRINCIPAL chief of the Shawnee Tribe of Indians,
vs.
THE UNITED STATES. } 16857.

I.—*Statement as to pleadings in this case.*

The original petition in the above-entitled cause was filed December 10, 1890.

An amended petition was filed by leave of court February 3, 1891.

The defendants filed a traverse of said petition July 3, 1891.

On the 21st day of July, 1891, the claimant filed a second amended petition by leave of court, to stand as substitute for and in lieu of former petitions, which is as follows:

Amended petition filed July 21, 1891.

To the honorable the Judges of the Court of Claims:

Your petitioner, Johnson Blackfeather, for and on the part of the Shawnee tribe of Indians, under the authority of and by virtue of the act of Congress, approved October 1, 1890, entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," which act, among other things, provides as follows (see Exhibit A, copy of act): "That the Shawnee Indians are hereby authorized and empowered to bring and begin suit in law or equity against the United States

2 Government in the Court of Claims to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom; that the said suits may be brought in the name of the principal chief of the Shawnee Indians;" and under the provisions of act entitled "An act supplementary and amendatory to an act entitled 'An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation and for other purposes,' approved October first, eighteen hundred and ninety," approved July 6, 1892 (see Exhibit B, copy of act); and that Johnson Blackfeather, the principal chief of the Shawnee tribe of Indians, as by said acts of Congress required, has caused this suit to be brought by and through proper instructions to James W. Denver, and C. Brownell, and full power of attorney to C. Brownell, of Washington, District of Columbia, who therefore files this petition for the purposes mentioned in said acts of Congress.

2. Your petitioner again states that prior to December 30, 1825, the said Shawnee Indians were individually and collectively in possession of and occupied a tract of land near Cape Geredeau, in the State of Missouri, under a permit from the Spanish Government, given and granted to them, the said Shawnee Indians, by the Baron De Carondlet on the 4th day of January, 1793, as recorded in the records of land titles at St. Louis, in the State of Missouri, containing about twenty-five miles square of land.

That the said Shawnee Indians, under an assurance and promise of receiving from the United States other lands in exchange, did remove off from said lands, after having made valuable improvements on the said lands, which improvements was taken possession of and appropriated by United States citizens, and that at said time, to wit, on the 30th day
3 of December, 1825, and on the 7th day of November, 1825, by William Clark, Superintendent of Indian Affairs, duly authorized on the part of the United States Government, and the chiefs, warriors, and headmen of the Shawnee tribe of Indians, duly authorized on the part of the Shawnee tribe of Indians, at the city of St. Louis, in the State of Missouri, and at the time last aforesaid, made and entered into a treaty with the said Shawnee Indians and the United States Government, whereby and in said treaty the said Shawnee Indians did cede and relinquish all their claims, right, and title in and to said lands as described, situate, lying, and being between the River St. Come and Cape Geredeau and bounded on the east by the Mississippi and westwardly by White Water.

And that in consideration of the cession made as aforesaid by the said Shawnees to the United States Government the said United States Government did then and there covenant, promise, and agree with the said Shawnee Indians to give and grant to the said Shawnee tribe of Indians within the State of Missouri, for themselves and for the Shawnee Indians located and residing in the State of Ohio who should thereafter emigrate to the west of the Mississippi River, a tract of land equal to fifty miles square, situated and lying west of the State of Missouri, bounded as follows: Commencing at a point two miles northwest of the southwest corner of the State of Missouri and from thence north twenty-five miles, thence west one hundred miles, thence south twenty-five miles, thence east one hundred miles to the place of beginning. And, in addition to the above compensation and consideration, and for the purpose of reimbursing and paying a fair equivalent for the losses and inconveniences which the said Shawnee tribe of Indians sustained and suffered by their removal from and off the said lands, and to enable the said Shawnee Indians to obtain supplies in their new settlements as aforesaid, the United States Government, in said treaty, did covenant, promise, and agree to pay to the said
4 Shawnee Indians emigrating from and off the said lands the sum of fourteen thousand dollars ($14,000) as soon as practicable after the ratification of the said treaty; and it was stipulated and provided that five thousand ($5,000) of the said fourteen thousand dollars was to be paid and furnished to the said Shawnee Indians in domestic animals, implements of husbandry, and provisions as soon as the said tribe did remove and settle on the lands assigned as above described.

Your petitioner avers the fact to be that the said treaty was ratified and proclaimed, in compliance with the Constitution and laws of the United States Government in such cases made and provided, on, to wit, the 30th day of December, 1825, and that the said Shawnee tribe of Indians at said time did move off from the said lands, near the Cape Gerodeau, in the State of Missouri, and located and settled on the lands west of the Mississippi River and west of the State of Missouri, as and in compliance with the provisions and stipulations in said treaty made. This petitioner is informed and believes that the United States Government at the time

mentioned did not pay to, and neglected and refused to pay to, the said Shawnee Indians the said sum of fourteen thousand dollars ($14,000) or any part thereof, and that the said sum of money is yet unpaid and due from the United States Government to the said Shawnee Indians, and that the said sum of fourteen thousand dollars is wrongfully held and diverted from the tribal funds of the said Shawnee Indians by the United States Government.

3. This petitioner again states and avers that by the provisions and stipulations of the aforesaid treaty the United States Government covenanted, promised, and agreed to and with the said Shawnee Indians, and at the time and place aforesaid, and for the purpose of making a final settlement and paying of the claims which the said Shawnee Indians at said time made and had against the citizens of the United States
5 for the destruction and spoliation of the property of the said Shawnee Indians by the said citizens aforesaid, at said Cape Gerardeau, in the State of Missouri, the sum of eleven thousand dollars ($11,000).

This petitioner states and avers that he is informed and believes that the said sum of eleven thousand dollars, nor any part thereof, was never paid to the said Shawnee Indians, and that the said sum of money is wrongfully diverted and withheld by the United States Government from and out of the Shawnee tribal funds, as provided and stipulated in the aforesaid treaty.

4. This petitioner again and further states that prior to August 8th, A. D. 1831, a part of the said tribe owned, possessed, and occupied a tract of land in the State of Ohio granted to the said Shawnee Indians by patent in fee simple under and by virtue of a treaty made by and between the United States Government and the said Shawnee Indians on the 29th day of September, 1817 (proclaimed January 4, 1819), containing one hundred and twenty-five sections or square miles of land, described and bounded as follows: "A tract of land ten miles square, the center of which shall be the council house at Wapaghkonneta," and "a tract of land containing twenty-five miles square, which is to join the tract of land at Wapaghkonneta and to inclose the, or include the, Shawnee settlement on Hog Creek, and to be laid off as nearly as possible in a square form; "which two tracts or reservations of land were granted as aforesaid to the said Shawnee Indians by patents signed by the Commissioner of the General Land Office and certified to by the Secretary of War, bearing date of April 20, 1821; also one other tract of land granted to the said Shawnee Indians by the second article of the treaty made at St. Mary's, in the State of Ohio, on the 17th day of September, 1818 (proclaimed January 14, 1819), described and bounded as follows: "Twelve thousand acres of land, to be laid off adjoining the east line of the reserve, of ten miles square,
6 Wa-pa-ghk-on-net-ta," State of Ohio, making in the whole the aforesaid cessions to the United States by the said Shawnee Indians one hundred and forty-five sections or square miles of land, which included all the lands owned or claimed by the said Shawnee Indians in the State of Ohio.

That on the 8th day of August, A. D. 1831, at Wapaghkonnata, county of Allen, in the State of Ohio, the said Shawnee Indians, by their principal chiefs, headmen, and warriors, duly authorized, and the United States

Government, by James B. Gardiner, a specially appointed commissioner for and on the part of the United States Government, and John McElvan, Indian agent for the Wyandots, Senecas, and Shawnee Indians residing in the State of Ohio, duly authorized on the part of the United States Government, made and entered into a treaty with the said Shawnee Indians and the United States Government, in which treaty the said Shawnee Indians, then residing at Wapaghkonnetta and on Hog Creek, in the State of Ohio, in consideration of the provisions and stipulations therein made and covenants, obligations, agreements, and promises made by and on the part of the United States Government, the said Shawnee Indians did then and there cede, release, and quitclaim forever to the United States Government the lands so granted to them, the said Shawnee Indians, described and bounded as above set forth, containing one hundred and forty-five sections of land as aforesaid, aggregating ninety-six thousand and fifty-one and forty-eight one-hundredth acres (96,051·48), and which included all the land owned by the said Shawnee Indians in the State of Ohio.

That in consideration of the aforesaid cessions of land the United States Government stipulated, covenanted, promised, and agreed to and with the said Shawnee Indians (1) to move the said Shawnee Indians from the lands in said Allen County at Wapaghkonnata, in the State of Ohio, to the west side of the Mississippi River; and (2) to give and grant to the said
7 Shawnee Indians, by patent, in fee simple, forever, as long as they shall exist as a nation and remain upon the same, a tract of land to contain one hundred thousand acres (100,000), to be located under the direction of the President of the United States, within the tract of land, equal to fifty miles square, which was granted to the Shawnee Indians of the State of Missouri by the second article of the treaty made at the city of St. Louis, in the State of Missouri, with the Shawnee Indians of Missouri on the seventh day of November, A. D. 1825, in which treaty it is provided that the grant aforesaid should be for the Shawnee Indians in the State of Missouri and the Shawnee Indians who should reside in the State of Ohio who should afterwards emigrate west of the Mississippi River, the United States Government stipulating and agreeing to pay and defray all expenses of removal of the said Shawnee Indians from and to the places last aforesaid.

In the aforesaid treaty the United States Government again and further covenanted, promised, and agreed to and with the said Shawnee Indians to expose to public sale to the highest bidder the tracts of land above described and ceded by the said Shawnee Indians to the United States Government, and after deducting from the proceeds of the sale of the said lands seventy cents per acre, exclusive of the cost of surveying, the cost of a gristmill, sawmill, blacksmith shop, and the sum of $13,000 advanced by the United States Government to pay for the improvements which the said Shawnee Indians were compelled to abandon and leave behind on the said lands in the said State of Ohio, the balance or remainder of the proceeds of the sale of the said lands should constitute and create a fund for the future necessities of the said Shawnee Indians, and that the United States Government promised and agreed to pay to the chiefs of the said Shawnee Indians, for the use and general benefit of the Shawnee people, annually, 5 per centum per annum on the said amount as an annu-

ity, and said fund and payment to be continued during the plea-
8 ure of Congress unless the chiefs of the said Shawnee Indians, by and with the consent of the Shawnee people in general council assembled, should decide that the fund so created should be dissolved and be paid over to them. In such case the President shall cause the said fund to be paid to the said Shawnee people if, in his discretion, he believes the happiness and prosperity of the Shawnee people would be promoted thereby.

This petitioner shows that the amount of the said land is 145 sections, aggregating 96,051·48 acres of land, and that in the said treaty provisions and stipulations the United States Government covenanted, obligated, and promised to pay to the said Shawnee Indians so much of the proceeds of the said lands when sold in compliance with the 7th article of the treaty of August 8, 1831, after deducting seventy cents per acre, exclusive of the cost of surveying and the other items therein mentioned.

This petitioner avers that the aforesaid provision in relation to the seventy cents per acre to be deducted and retained out of the proceeds of the said lands as before alleged to be a price to be paid for the 100,000 acres of land in Missouri to the United States Government, is and was a false and unauthorized construction of the said treaty. The true construction is, that the lands should not be sold for a less price than two dollars eight and three-fourths cents per acre, and that the said land should be exposed and sold at public sale to the highest bidder, as provided in the 7th article of the said treaty of August 8, 1831, in the manner provided by the said 7th article of the treaty, and that the said amount should be paid to the Shawnee Indians by the United States Government as the consideration and in payment for the said Ohio lands; and the amount over and above seventy cents per acre realized from the proceeds of the sale of the said lands was to be set aside to create the fund for the future necessities of the said Shawnee Indians. This was the way the contracting parties
9 ascertained the amount to be retained for the purpose aforesaid, as stipulated and provided in the said treaty.

That the amount of money at seventy cents per acre is, in aggregate, $67,236.05, and that said amount belongs to the said Shawnee Indians' tribal fund, and not to the United States Government; that the said Shawnees never received the said 100,000 acres in the State of Missouri or any part thereof.

This petitioner again and further shows that the said treaty expressly provides and stipulates that in lieu of the improvements which have been made on the lands sold and ceded by the said treaty to the United States Government the United States Government should advance to the Shawnee Indians out of the purchase money for this tract of land, for the purpose of enabling them to erect houses and open farms at their intended residence, the sum of $13,000, which was to be reimbursed, deducted and paid back to the United States from the sales of the said lands ceded; and a fair and an equitable distribution of this sum was to be made by the chiefs of the said Shawnee Indians, with the consent of the people in general council assembled, to such individuals of the Shawnee Indian tribe who had before made improvements on the lands ceded, and as such would be properly entitled to this money.

This petitioner avers that the said sum of $13,000 was and now is due and payable to the Shawnee Indian tribe; that the advance was never made by the United States Government at the said time to pay to individual Shawnee Indians who had before made improvements on the said ceded lands and were left on the land at the time that the said Shawnee Indians moved off of the lands, as provided in the said treaty, and that the deduction of the said amount which is provided for to be made out of the proceeds of the sale of the said lands was intended to be and is a part of the Shawnee Indian tribal fund arising out of the gross consid-
10 eration and gross amount that the United States Government covenanted and agreed to pay for the aforesaid lands.

This petitioner avers the fact to be that the aforesaid lands were not sold and disposed of by the United States Government, as provided in the said treaty, nor as provided in acts of Congress, and that he is informed and believes that the United States Government did receive from the proceeds of the sale of the said lands the sum of, to wit, one hundred and twenty-two thousand six hundred and thirty-three dollars and seventy-eight cents ($122,633.78), and there was deducted from and out of the said last amount for the purposes provided, (1) the sum of, to wit, $67,236.05, which amount aggregates the sum of seventy cents per acre on the whole amount of acres of land so sold and ceded; (2) the sum of, to wit, $5,000 for a grist mill; (3) the sum of, to wit, $2,000 for a saw mill; (4) the sum of, to wit, $1,000 for a blacksmith shop, and (5) the sum of $13,000 to pay for the abandoned improvements which individual members of the Shawnee tribe of Indians before made and which they left on the lands so ceded. These several amounts aggregate $88,236.05. This amount deducted from and out of the $122,633.78, the estimated gross amount which the United States Government received from the proceeds of the sales of the said lands, leaves a remainder of $34,397.73. This amount, by the provisions of the said treaty, was to create a fund, which was to be retained by the United States Government, and the said United States Government covenanted and agreed to pay 5 per centum as an annuity to the chiefs of the said Shawnee Indians for the "future necessities of the said tribe," contingent and conditional, as expressed and before herein set forth.

The petitioner further states that he is informed and believes that the Congress of the United States has never passed any act or joint resolution to dissolve or discontinue the said created fund, nor annulled the payment of the 5 per centum per annum interest on the said created
11 fund as an annuity, and that the chiefs of the said Shawnee Indians nor the Shawnee people, in a general council assembled, have never heretofore expressed a desire or any request that the said so created fund should be dissolved or discontinued and paid over to them, and that the President of the United States has never directed, ordered, or caused the said created fund to be paid to the said Shawnee Indians, and that the said Shawnee Indians have never received the said sum of $34,397.73 or any part thereof, nor the 5 per centum per annum interest on the said sum or any part thereof, and that the said principal sum and the said interest belongs to the Shawnee Indian tribal fund, and is wrongly diverted and withheld from and out of the said tribal fund by the United States, and that the said amounts are justly due and unpaid to the said Shawnee Indians.

This petitioner again states that he is informed and believes that the said sum of $67,236.05, which aggregates and represents the said amount of seventy cents per acre for the said 96,051.48 acres of the said land as described and set forth in the said treaty, and which sum of money is, by the said treaty, to be deducted from and out of the proceeds of the sales of the said lands, was never paid over to the said Shawnee Indians, nor any part thereof, as provided by the said treaty, and that the said sum of money belongs to the tribal fund of the said Shawnee Indians, but is wrongfully retained and withheld and wrongfully diverted by the United States Government from and out of the said tribal fund, and that the said amount is justly due and unpaid to the said Shawnee Indians.

This petitioner again states that the said sum of $13,000, which is expressly provided and stipulated to be paid in advance to the said Shawnee Indians to pay to the individual Shawnee Indians who had, at the time of making the said treaty, improvements on the said lands, and which improvements they were compelled to leave behind; and it is also
12 further provided that the said sum of $13,000 should be deducted from and out of the proceeds of the sales of the aforesaid lands by the United States Government, and that the said sum of $13,000 was never paid over to the said Shawnee Indians, as provided and contemplated by the said treaty, and that the said sum of $13,000 belongs to the said Shawnee Indians' tribal fund, and that the said sum of money is wrongfully retained and withheld and wrongfully diverted from their tribal fund by the United States Government, and that the said amount is justly due and unpaid to the Shawnee Indians.

5. This petitioner avers that all of the said land so ceded and conveyed to the United States under the provisions and stipulations of the said treaty of August 8, 1831, was owned and possessed and occupied by the said Shawnee tribe of Indians, as is evidenced by a patent issued to the said Shawnee tribe of Indians by the United States, as set out and described in article one of the said treaty of August 8, 1831, and that article seven of the said treaty expressly provides that the United States, as the trustee and agent and in trust for the said Shawnees, will take the said land, the said 96,051·48 acres, and that the United States will expose to public sale, to the highest bidder, in the manner of selling the public lands, the said tracts of land therein ceded by the said Shawnees, but your petitioner avers and states that the said lands were taken by the United States and were not by the United States exposed to public sale to the highest bidder, except 9,841·27 acres, which brought $2.08¾ per acre, amounting to $20,543.99; that 81,665·62 acres was by the United States sold at private sale for the sum of one dollar and twenty-five cents ($1.25) per acre, contrary and in violation to and of the stipulations of the said seventh article of the said treaty and in violation of the trust and confidence reposed and obligated by the United States in the said article, as more fully appears.

Reference is made to Exhibit (C), hereto attached and made a part
13 of this petition, and that the said Shawnees here claim that by the said violations and wrongful acts of the said United States they have been defrauded and deprived of their rights guaranteed to them, and that they claim to have a right to recover and collect in this action from the United States the sum difference between the amount of two dollars and eight and three-fourths cents per acre on the amount of land which

was so wrongfully sold at private sale at the amount of one dollar and twenty-five cents per acre, which is 81,661·62 acres, which difference is eighty-three and three-fourths cents per acre, which in aggregate makes $68,491.28, and with interest added at 5 per centum per annum on the above amount of money from the date or time of the making and ratifying the said treaty up to and including the time that the said amount shall be paid by the United States under the decree and judgment of this court.

6. This petitioner again avers and states that the whole of the said tract of land ceded to the United States at the time and place mentioned and described in the said treaty of August 8th, 1831, was and is 96,051·48 acres, which was all of the land owned by the said Shawnees in the said State of Ohio, and that the United States, under the provisions and stipulations in the said seventh article of the said treaty, did receive the said amount of land, and undertook and obligated itself to expose the said land and all of the said amount of the said land at public sales, and to be sold to the highest bidder, but that the United States only sold a portion of the said land as provided—that is, the amount of 9,841·27 acres—at such public sale, for the price of two dollars and eight and three-fourths of a cent per acre, which in aggregate amounted to the sum of $20,543.99, leaving a remainder of 81,665·62 acres reported sold at private sale at one dollar and twenty-five cents per acre, but which leaves 5,544·59 acres unsold and not accounted for in the said sales of the said lands.

14 And that the said lands were and are worth the price of two dollars and eight and three-fourths of a cent per acre, making in aggregate an additional sum of $11,588.18, with interest at five per centum per annum on the said last amount of money from the date of the ratifying of the said treaty up to and including the time which the United States shall pay to the said Shawnees for the said land.

7. This petitioner again avers and states that on the 30th day of April, 1802 (2 Stats., p. 173), the Congress of the United States passed and the President approved an "Act to enable the people of the eastern division of the Territory, northwest of the river Ohio, to form and constitute a State government," and that section seven of the said act provides as follows:

"First. That the section number sixteen in every township, and, where such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools."

And, again, on the third day of March, 1803 (2 Stats., p. 225), Congress passed and the President approved "An act in addition to and in modification of the proposition contained in the act" above cited and referred to, and the fourth proviso of the first section of the act is as follows:

"One thirty-sixth part of all the lands of the United States lying in the State of Ohio, to which the Indian title has not been extinguished, which may hereafter be purchased of the Indian tribes by the United States, which thirty-sixth part shall consist of the section No. sixteen in each township, if the said lands shall be surveyed in townships of six miles square, and shall, if the lands be surveyed in different manner, be designated by lots for the use of schools."

This petitioner states that the said Shawnees' tract of land was
15 located in the said State of Ohio, and that the said Shawnee Indians' title in and to the said lands was extinguished by the terms and provisions and stipulations in the said treaty in the month of August, in the year 1831, and that the said State of Ohio, under the provisions, stipulations, and grants before made in the aforesaid acts of Congress to the said State of Ohio, the said State of Ohio did receive and did appropriate the said land so received from the United States and which was granted to the said State of Ohio by the United States for the support and maintenance of schools in the said county of Allen, to wit, Auglaise, in the said State of Ohio, the amount of three thousand acres of the said Shawnees' lands so ceded and conveyed to the United States under the provisions, stipulations, and cessions made in the articles of the said treaty of August 8th, 1831, and that the United States nor the said State of Ohio have not paid to the said Shawnee Indians anything or amount of money for the said lands or any part thereof, and that the said lands are yet unaccounted for and unpaid for to the said Shawnee Indians, and that the said lands were and are worth the sum of two dollars and eight and three-fourths cents per acre, to wit, on the eighth day of August, 1831, and that the amount of the purchase price for the said land as appears is $6,262.50, for which in addition these Shawnees claim interest at five per cent per annum on the said last sum of money, from the eighth day of August, 1831, up to and including the time which the said United States may or shall pay to these Shawnees for the amount of the said lands on the said sum of money so wrongfully withheld from the said Shawnees.

8. This petitioner again avers and states that the said treaty of August 8th, 1831, article thirteen, among other other things and stipulations provides as follows:

"And at the request of the chiefs it is also stipulated that the price of an average section of the lands herein ceded shall be reserved in the hands
of the Government, to be paid to their friends, the Shawnees, who
16 reside on the River Huron, in the Territory of Michigan, for the purpose of bearing their expenses should they ever wish to follow the Shawnees of Wapaghkonnetta and Hog Creek to their new residence west of the Mississippi."

This petitioner states that he is informed and believes that at the said time of the said sales of the said lands so ceded to the United States by the said Shawnee Indians in the said treaty of August 8, 1831, the United States, by its officers, authorized and empowered, did, in accordance with the said stipulations of the said thirteenth article of the said treaty, reserve and keep back out of the said moneys derived from the sales of the aforesaid lands for the purposes therein mentioned the sum of $1,336.00, which was the average price for a section of the said lands, and that the said amount of $1,336.00 has never been paid to the said Shawnees by the United States, nor was the said sum of money or any part of the same ever by the United States paid for the, or to, the friends of the said Shawnees, who then resided on the river Huron, in the Territory of Michigan, to enable them to join the said Shawnees in their new home on the Mississippi River; but that the said amount of money, as this petitioner is informed and believes, still is and yet remains in the possession of the United States, and the said Shawnees here claim, in addition to the

amounts hereinbefore claimed, the said amount of one thousand three hundred and thirty-six dollars, with interest added to the said amount at five per cent per annum from the eighth day of August, 1831, up to and including the time which the United States may or shall pay to the said Shawnee Indians the said sum of money so wrongfully retained from the said Shawnee Indians.

9. This petitioner again avers and states that on the eighteenth day of May, 1796, Congress passed and the President approved an act (Vol. 1, p. 464) entitled—

17 "An act to provide for the sale of the lands of the United States in the territory northwest of the river Ohio and above the mouth of Kentucky River."

And that section four of this act provided as follows (p. 467):

"Provided always, that no part of the lands directed by this act to be offered for sale shall be sold for less than two dollars per acre."

And that afterwards, on the tenth day of May, 1800, Congress passed and the President approved an act (Vol. 2, p. 73) entitled—

"An act to amend the act entitled 'An act to provide for the sale of the lands of the United States in the territory northwest of the Ohio and above the mouth of the Kentucky River.'"

And that section five of this act is as follows (p. 75):

"And be it further enacted, That no lands shall be sold by virtue of this act, at either public or private sale, for less than two dollars per acre, and payment may be made for the same by all purchasers, either in specie or in evidence of the public debt of the United States." * * *

And that afterwards Congress passed and the President approved the following act on the fourteenth day of July, 1832 (Vol. 4, p. 601), entitled—

"An act to authorize the sale of certain public lands in the State of Ohio."

And which is as follows:

"Be it enacted, &c., That the lands heretofore reserved for certain Indian tribes in the State of Ohio, and which were ceded to the United States by treaties ratified on the twenty-fourth day of March, in the year one thousand eight hundred and thirty-one, and on the sixth day of April, one thousand eight hundred and thirty-two, be, and the same

18 are hereby, attached to and made to form part of the land districts in which they are respectively situated, and liable to be sold as other public lands in the State of Ohio."

And this petitioner again states and avers the fact that the said Shawnee treaty with the United States, made at Wap*h*gakonnata, Ohio, on the eighth day of August, 1831, was ratified on the sixth day of April, 1832, by the United States, in compliance with the Constitution of the United States and the acts of Congress in such cases made and provided, and that the said land mentioned in the said act was the land which the said Shawnees did cede and convey to the United States in the articles of the said treaty, and that the said land was and is situated in one of the land districts heretofore created by the acts of Congress in the said State of Ohio, and that the action of the officers of the United States in selling a portion of the said lands at private sales, in the said State of Ohio, for the price of one dollar and twenty-five cents per acre, was and is a direct

and intentional violation of the said acts of Congress aforesaid, and that the United States is obligated and liable to pay to the said Shawnees for the aggregate amount for the sales of the said lands, so sold at private sale, to the amount of two dollars per acre instead of one dollar and twenty-five cents per acre, and the difference between two dollars per acre and one dollar and twenty-five cents per acre, which is seventy-five cents per acre, on 81,666 acres, making an aggregate of $61,249.50 for which the said Shawnees here claim in addition to the amount as shown to have been received by the United States in a statement made by the Commissioner of the General Land Office of the United States on the 16th day of November, 1891, and hereto attached and made a part of this petition as Exhibit C, with interest on the said amount, at five per cent per annum, from the said 8th day of August, 1831, up to and including the
19 time which the said United States may or shall pay to the said Shawnees the said sum of money so wrongfully withheld from them.

10. This petitioner again further states that prior to the 10th day of May, 1854, the said Shawnee tribe of Indians owned, possessed, and occupied a tract of country west of the State of Missouri, which was assigned, ceded, and set apart for the Shawnee Indians in fulfillment and pursuant to the second and third articles of a treaty made by the United States Government with the said Shawnee Indians at St. Louis, Missouri, on the 7th day of November, 1825, and the second article of the treaty made by the United States Government with the said Shawnee Indians at Wapaghkannata, in the State of Ohio, on the 8th day of August, 1831, and that the said tract of country is described by metes and bounds as follows: "Beginning at a point at the western boundary of the State of Missouri three miles south of where the said boundary crosses the mouth of the Kansas River, thence continuing south and coinciding with the said river for twenty-five miles; thence due west one hundred and twenty miles; thence due north until the said line shall intersect the said southern boundary of the Kansas Reservation; thence due east, coinciding with the southern boundary of the said reservation, to the termination thereof; thence due north, coinciding with the eastern boundary of the said reservation, to the southern shore of the Kansas River; thence along the southern shore of said river to where a line to the place of beginning, drawn due west, shall intersect the same," estimated to contain sixteen hundred thousand acres, more or less.

That on the tenth day of May, 1854, in the city of Washington, District of Columbia, the United States Government, by George W. Manypenny, a commissioner duly authorized for and on the part of the United States Government, and the following-named delegates, representing the bands of the Shawnee Indians who were parties to the treaties of the 7th
20 of November, 1825, and August 8th, 1831, viz, Joseph Parks, Black Hoof, George McDougal, Long Tail, George Bluejacket, Graham Rogers, Wa wah che pa e kar, or Black Bob, and Henry Bluejacket, duly authorized by the now united tribe of the Shawnee Indians, made and entered into a treaty with the United States Government and the said Shawnee Indians, and the said Shawnee Indians then and there ceded and conveyed to the United States Government all their right, title, and interest in and to the aforesaid-described land, and the United States

Government, as a part of the consideration, ceded to the Shawnee Indians 200,000 acres of land selected and located between the Missouri State line and a line parallel thereto and west of the same thirty miles distant, which now comprises a portion of the State of Kansas.

In consideration of the said sale and cession of the said land, as provided by the said treaty, the United States Government agreed to pay to the said Shawnee Indians the sum of eight hundred and twenty-nine thousand dollars in the manner as follows: Forty thousand dollars to be invested by the United States at a rate of interest not less than 5 per centum per annum on the said sum, and seven hundred thousand dollars to be paid in equal annual installments during the month of October of each year, commencing with the year 1854, and the residue, eighty-nine thousand dollars, to be paid within the same month of the year after the termination of that period.

This petitioner further states that he is informed and believes that all the said payments were made as stipulated and provided in the said treaty except the last payment of, to wit, one hundred thousand dollars, due in the month of October, 1862, and that at which said time the United States Government, the Superintendent of Indian Affairs, retained, kept back, and out of the said last payment, to wit, the sum of twelve thousand dollars and the further sum of ten thousand
21 dollars, and without the request or consent or desires and against the protests of the said Shawnee Indians.

That, to wit, in the year of 1884, Congress passed and the President approved an act making an appropriation to supply deficiencies the sum of, to wit, ten thousand dollars, to be paid to the Shawnee Indians on account of arrears of annuities due under the third article of the treaty of 1854 as aforesaid; that the United States Government, the Commissioner of Indian Affairs, and the Secretary of the Interior refused and still doth refuse to pay to the said Shawnee Indians the said sum of money or any part thereof, as directed by the said act of Congress; and that the said several sums of money, to wit, the sum of $12,000 and the sum of $10,000 and the further sum of $10,000, which aggregate $32,000, is a part or a portion of the last payment due the said Shawnee Indians in the said month of October, 1862, as is provided and stipulated in the aforesaid treaty of the 10th of May, 1854; and that the said sum of money is a part or a portion of the said Shawnee Indians' tribal fund; and that the sum of $22,000 and interest at 5 per centum per annum on the said last-named sum from the said month of October, 1862, up to and including the present time and the said sum of money, to wit, $10,000, so appropriated by the act of Congress in 1884, with interest at 5 per centum per annum from said time up to and including the present time, is wrongfully retained and withheld and wrongfully diverted from and out of the said Shawnee Indians' tribal fund by the United States Government, and that the said sum of money is justly due and unpaid to the said Shawnee Indians.

11. Wherefore this petitioner prays that the said sum of $14,000 here claimed to be due and unpaid under and by virtue of the provisions of the treaty of November 7, 1825, and as set up in section two to this petition, and the further sum of $11,000 claimed to be due and unpaid under and

by virtue of the aforesaid treaty, as alleged in the third section
22 of this petition, which sums aggregate $25,000, and the further sum of $34,397.73, with interest at 5 per centum per annum, as provided by the treaty of August 8, 1831, and the further sum of $67,236.05 and $13,000, in the aggregate, $80,236.05, with the interest as aforesaid, here claimed to be due and unpaid under the provisions of the treaty last aforesaid and as alleged in section 4 of this petition.

And the further sum of $68,491.28, with interest on the said amount from the date of the approval and ratification of the said treaty of August 8, 1831, up to and including the present time, which is the aggregate amount of the difference between two dollars and eight and three-fourths of a cent per acre and one dollar and twenty-five cents per acre on 81,666 acres, as alleged in section 5 of the petition.

And the further sum of $11,588.18, which is the amount of two dollars and eight and three-fourths cents per acre for 5,544 and fifty-nine one-hundredths acres, which appears by the statement of the Commissioner of Lands to be unsold, unaccounted for, and unpaid for, with interest added from the date of the ratification of the said treaty up to and including the time when the same will be paid, as alleged in section 6 of the petition.

And the further sum of $6,262.50, with interest at 5 per cent per annum added on the said amount from the time of the ratification of the said treaty up to and including the time the same shall be paid, for three thousand acres of the said Shawnees' lands appropriated by the State of Ohio for the use and maintenance of schools at two dollars and eight and three-fourths cents per acre, as alleged in section 7 of the petition.

And the further sum of $1,336, with interest at 5 per cent per annum from the date of the ratification of the said treaty up to and including the time that the amount shall be paid, for the amount which was
23 retained by the United States under the provision of the thirteenth article of the said treaty, as alleged in section 8 of the petition.

And the further sum of $61,249.50, with interest at 5 per cent per annum added to the said amount, which is the difference between two dollars per acre and one dollar and twenty-five cents per acre on 81,666 acres of the lands which was so sold by the United States in violation of the several acts of Congress, as alleged in section 9 of the said petition.

And also the further sum of $12,000, with interest thereon, at the rate of 5 per centum per annum, from the month of October, 1862, up to and including the present time; and the further sum of $10,000, with interest thereon from the said month of October, 1862, at the rate of 5 per centum per annum, up to and including the present time; and the further sum of, to wit, $10,000, with interest at the rate of 5 per centum per annum, from the 4th day of March, 1884, up to and including the present time, which three last sums aggregate $32,000, here claimed, with the interest as aforesaid, to be due and unpaid under the provisions of the treaty of the 10th day of May, 1854, and the act of Congress passed and approved A. D. 1884, as alleged in section 5 of this petition; that the said claims, as set out in the several allegations of this petition, may be by this honorable court examined and investigated on the facts and the merits as to the rights and equities of these Shawnees and a true account be made and stated, and so much of the said claims as may be found to be due and unpaid to the

said Shawnee Indians and wrongfully diverted from their tribal fund or in any manner withheld or retained by the United States Government shall be ordered and decreed by this court to be paid to the said Shawnee Indians in the manner as provided by the treaties and laws of the United States Government in these claims and such cases made and provided, and that 10 per centum of the gross amount which may be found to be
24 due and payable to the Shawnee Indians this court will decree as compensation and pay for the labor and services of the attorneys herein for the said Shawnee Indians in the prosecution of the aforesaid claims, and such an additional sum to reimburse or repay the said attorneys for their costs and court fees laid and paid out and expended from time to time in the preparation and prosecution of these claims.

In consideration whereof, and inasmuch as the claims made and the wrongs complained of are remediless in the premises under the rules of the common law and are only relievable in a court authorized by acts of Congress and are cognizable only in this form and procedure, this petitioner further prays that the United States Government, the defendant herein, be required to answer separately and singly the allegations herein made and the claims alleged, but not under oath, the oath being expressly waived, and that the said defendant's answer shall truly and fully set out and exhibit a full and true statement of all the claims and demands herein set forth in this petitioner's petition for the said Shawnee Indians; and your petitioner will ever pray.

JOHNSON BLACKFEATHER,
By CHARLES BROWNELL,
His Attorney-in-Fact.

DENVER & BROWNELL,
Attorneys for Petitioner.

UNITED STATES OF AMERICA,
Washington, District of Columbia:

Charles Brownell, first sworn, on his oath states that he is the attorney-in-fact for the petitioner, Johnson Blackfeather, and that he has read the above and foregoing petition and knows the contents thereof, and that the same are true of his own knowledge and belief except as to the allegations as are stated on information and belief, and as to those he believes it to be true.

CHARLES BROWNELL.

25 Subscribed and sworn to before me this — day of ——, ——.
[SEAL.]
——— ———,
Assistant Clerk Court of Claims.

Subscribed and sworn to before me this 20th day of July, 1892.
[SEAL.] FRANK A. BRANAGAN,
Notary Public.

Recapitulation of the several items and amounts claimed in this petition.

1.	Treaty of 1825, sec. 2, petition	$14,000.00	
2.	Do., sec. 3, do	11,000.00	
			$25,000.00
3.	Treaty of 1831, sec. 4, do	13,000.00	
	Interest, at 5 per cent, added from August 8, 1831, up to the time of payment.		
4.	Do., sec. 4, do	67,236.05	
	Interest, at 5 per cent, added from August 8, 1831, up to the time of payment.		
5.	Do., sec. 4, do	34,397.73	
	Interest, at 5 per cent, added from 8th of August, 1831, up to the time of payment.		
6.	Do., sec. 5, do	68,491.28	
	Interest, at 5 per cent, added from August 8, 1831, up to the time of payment.		
7.	Do., sec. 6, do	11,588.18	
	Interest, at 5 per cent, added from August 8, 1831, up to the time of payment.		
26 8.	Treaty of 1831, sec. 7, petition	6,262.50	
	Interest, at 5 per cent, added from August 8, 1831, up to time of payment.		
9.	Do., sec. 8, do	1,336.00	
	Interest, at 5 per cent, added from August 8, 1831, up to time of payment.		
			189,411.74
10.	Do., sec. 9, do	61,249.50	
	Interest, at 5 per cent, added from August 8, 1831, up to the time of payment.		
	If item 6 is allowed, the above last item will not be claimed, but if item 6 is disallowed this item is claimed.		
11.	Treaty May 10, 1854, sec. 10, petition	12,000.00	
	Interest, at 5 per cent, from the month of October, 1862, up to the time of payment added.		
12.	Do., sec. 10, do	10,000.00	
	Interest, at 5 per cent, added from October, 1862, up to the time of payment.		
13.	Do., act of March 4, 1884, do	10,000.00	
	Interest, at 5 cent, added from March 4, 1884, up to the time of payment.		
			32,000.00

27

EXHIBIT A.

(Public—No. 335.)

An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States, as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteen, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians

April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six, in respect to the subject-matter herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have or may be paid into the treasury of, or in any way have come, or may come, into the pos-
28 session of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the act passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be impaired by any acts passed and approved by the Cherokee national council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such courts shall be the practice and law in these cases; and copies of petitions filed in the case at the commencement of the suit shall be served upon the Attorney-General of the United States and on the principal chief in the Cherokee Nation by the marshal of the district court for Indian Territory; and that the costs of the said suits shall be apportioned between the United States and the other parties to such suits as to said court, law, and equity shall require. The Attorney-General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution mandamus, or in any other way which the said court may see fit.

29 SEC. 4. That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government, in the Court of Claims, to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right of appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections one, two, and three of this act.

Approved, October 1, 1890.

EXHIBIT B.

(Public—No. 107.)

An act supplementary and amendatory to an act entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," approved October first, eighteen hundred and ninety.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication under the act of Congress passed and approved October first, eighteen hundred and ninety, entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," shall present to the said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them and the United States.

Approved, July 6, 1892.

15486——2

a

30 EXHIBIT (C).

Statement of the disposal of the lands ceded to the United States by the Shawnee Indians under treaty made and concluded at Wapaghkonnetta, in the county of Allen, State of Ohio, August 8, 1831 (U. S. Stats., vol. 7, p. 355), from the 24th day of December, 1832, to the 30th day of June, 1840 (inclusive), as shown by the records of this office.

Where sold—land office at—	When sold.	How sold.	By whom sold.	No. acres sold.	Price per acre.	Amount paid by purchasers.
Piqua, O....	24 Dec., 1832, to 1 Dec. 3, 1832.	Public sale. Private "	Thos. B. V. Horne, reg.	9,841·27	2.08⅓ av.	$20,543.99
"	1 Jan., 1833, " 31 Mar., 1833.	.....	.....	9,539·69	1.25	11,932.17
Wapaghkonnetta, O.	1 Apr., 1833, " 30 June, 1833.	.....	.....	9,483·05	1.25	11,853.82
" .	1 July, 1833, " 30 Sept., 1833.	.....	.....	4,230·37	1.25	5,287.98
" .	1 Oct., 1833, " 31 Dec., 1833.	.....	.....	2,875·27	1.25	3,594.10
" .	1 Jan., 1834, " 31 Mar., 1834.	.....	.....	3,428·23	1.25	4,285.30
" .	1 Apr., 1834, " 30 June, 1834.	.....	.....	7,042·96	1.25	8,803.70
" .	1 July, 1834, " 30 Sept., 1834.	.....	.....	2,455·76	1.25	3,069.72
" .	1 Oct., 1834, " 31 Dec., 1834.	.....	.....	4,249·49	1.25	5,311.87
" .	1 Jan., 1835, " 31 Mar., 1835.	.....	.....	1,632·74	1.25	2,040.93
" .	1 Apr., 1835, " 30 June, 1835.	.....	.....	1,488·62	1.25	1,860.78
Lima, O.....	1 July, 1835, " 30 Sept., 1835.	.....	John P. Helfenstein, reg.	1,188·11	1.25	1,485.15
"	1 Oct., 1835, " 31 Dec., 1835.	.....	.....	4,505·48	1.25	5,631.86
"	1 Jan., 1836, " 31 Mar., 1836.	.....	.....	3,702·40	1.25	4,628.04
"	1 Apr., 1836, " 30 June, 1836.	.....	.....	13,256·64	1.25	16,570.86
"	1 July, 1836, " 30 Sept., 1836.	.....	.....	5,536·10	1.25	6,920.14
"	1 Oct., 1836, " 31 Dec., 1836.	.....	.....	3,042·93	1.25	3,803.67
"	1 Jan., 1837, " 31 Mar., 1837.	.....	.....	1,646·33	1.25	2,057.91
"	1 Apr., 1837, " 30 June, 1837.	.....	.....	538·65	1.25	673.32
"	1 July, 1837, " 30 Sept., 1837.	.....	.....	258·46	1.25	323.07
"	1 Oct., 1837, " 31 Dec., 1837.	.....	.....	460·48	1.25	575.59
"	1 Jan., 1838, " 31 Mar., 1838.	.....	.....	200·00	1.25	250.00
"	1 Apr., 1838, " 30 June, 1838.	.....	.....	120·00	1.25	150.00
"	1 July, 1838, " 30 Sept., 1838.	.....	.....	40·00	1.25	50.00
"	1 Oct., 1838, " 31 Dec., 1838.	.....	.....	222·82	1.25	278.52
"	1 Jan., 1839, " 31 Mar., 1839.	.....	.....	268·72	1.25	335.90
"	1 Apr., 1839, " 30 June, 1839.	.....	.....	34·29	1.25	42.86
"	1 July, 1839, " 30 Sept., 1839.	.....	.....	40·00	1.25	50.00
"	1 Oct., 1839, " 31 Dec., 1839.	.....	.....	46·08	1.25	57.60
"	1 Jan., 1840, " 31 Mar., 1840.	.....	.....	80·00	1.25	100.00
"	1 Apr., 1840, " 31 June, 1840.	.....	.....	51·95	1.25	64.93
Total ...	.....	.....	.....	91,506.89	.....	122,633.78

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
November 16, 1891.

31 (4–207.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 16, 1891.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed statement of the disposal of the lands ceded to the United States by the Shawnee Indians under treaty of August 8, 1831 (U. S. Stats., vol. 7, p. 355), from the 24th day of December, 1832, to the 30th day of June, 1840, is a true and literal exemplification, as shown by the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

THOMAS H. CARTER,
Commissioner of General Land Office.

32 II.—*Traverse, filed May* 10, 1893.

And now comes the Attorney-General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said amended petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

33 III.—*Counter claim and set-off filed by defendants.—Filed June* 7, 1893.

The defendant says that at the time of and before the filing of the claimant's petition herein the defendant had and still has a valid and sustaining claim against the claiman therein for the sum of $12,182.03, overpaid the claimant on account of blacksmithing under the treaty of 1825. That by said treaty the United States agreed to sustain a blacksmith shop, blacksmith tools and iron for the said shop in the amount of 300 pounds annually for a period of 5 years in the discretion of the President, but no longer than 5 years, and the Government did not agree to provide an assistant blacksmith at all.

Now the defendants says that the Indian Department as and for the United States in mistake of duty and contrary to the treaty and in violation of law sustained a blacksmith and also an assistant blacksmith as well as a blacksmith shop, with an equipment of iron and tools, for a period of 33 years, from the date of the Shawnees taking possession of their new home up to 1854, at an extra expense to the United States above the stipulations of the treaty in relation thereto of $12,182.03.

And the defendant says that said sum ought to be, in justice and equity, set off against any sum which may be found due the claimant herein.

Wherefore defendant asks the judgement of the court whether the said sum of $12,182.03 shall not be set off against any sum which may be found due the claimant herein, and defendants demands all proper relief in the premises.

JOHN B. COTTON,
Assistant Attorney-General.
JOHN C. CHANEY,
Assistant Attorney.

34 *Findings of fact filed by the court January* 12, 1893.

This case having been heard by the Court of Claims the court upon the evidence, find the facts to be as follows:

I.

The following is the Spanish grant to the Shawnee Indians, to which reference is made in the preamble of the treaty between the United States and the Shawnees in Missouri, proclaimed December 30, 1825:

"Delawares and Shawnees, claiming a tract of country between the river St. Coure and Cape Gira'deau, and bounded on the east by the Mississippi and west by the White Water, district of Cape Gira'deau, produced to the board as follows, to wit:

"The Baron de Carondelet, knight of the faith of St. John, colonel of the royal armies, governor intendant-general, subprefect of the provinces of Louisiana, west Florida, and inspector of their troops, &c. Be it known by these presents, that in consideration of the good and faithful services that the said Louis Lorimer has rendered to the state since he has been a subject of His Catholic Majesty, we allow him to settle with the Delaware and Shawnee Indians who are under his control in such places as he may select in the province of Louisiana, on the right bank of the Mississippi, from the Missouri to the Arkansas River, which may have no governor, and both to hunt and plant thereon for the support of their families, and no commandant, officer, or king's subject shall have the power to oppose him in occupying the lands by him and the said Indians sown, planted, or settled, so long as they shall think proper to abide there; provided, in case they abandon them to move elsewhere they will be considered as vacant; and as for the house that the said Sir Louis Lorimer built at Cape Gira'deau, it shall remain in his possession, not to be taken from him for any reason except the sole ones of illicit commerce or corresponding with the enemies of the state.

"Wherefore we have given these presents, signed by our hand, and countersigned by the secretary of this government, and to which we have caused the seal of our arms to be affixed at New Orleans, on January 4, 1793.

"LE BARON DE CARONDELET.
"ANDRES LOPEZ ARMESTO.

"By order of his lordship."

II.

The Missouri band of Shawnees have received payments in accordance with the provisions of the treaty of 1825, but the following balance remains unpaid, $1,152.78.

III.

The lands which the treaty of 1831, between the United States and the Ohio band of Shawnees, ceded to the defendants herein were
35 received and sold. Of these lands, between December 24, 1832, and December 31, 1832, 9,841·27 acres were sold at public sale to

the highest bidder at the rate of $2.08\frac{3}{4}$ per acre; the total amount received for these lands is shown in Finding VI. The rest of the land so ceded was sold at private sale at the rate of $1.25 per acre. Some of the land sold at this rate of $1.25 per acre had improvements upon it; but most of the land so sold was unimproved. The lands were sold with reasonable expedition; the last sale was June 30, 1840. The total amount of the lands ceded was 96,051·48 acres.

The amount of land to be reserved to Francis Duquochet (article 11, treaty of 1831) was 320 acres.

The amount of land to be reserved to Joseph Parks (article 13) was 640 acres. The amount of land the price of which was to be reserved to the Michigan Shawnees (article 13) was 640 acres.

IV.

Whether the Shawnees, who, in 1831, resided on the River Huron, Michigan, have expressed a desire to follow the Shawnees of Wapaghkonnetta to their residence west of the Mississippi does not appear; nor does it appear that they have expressed a desire not to do so. Their wishes upon this subject are not disclosed.

V.

Out of the proceeds of the land sales in Ohio the United States has retained (at 70 cents per acre) the amount shown in Finding VI; also $6,994.40, the cost of the grist mill and sawmill; also $1,011, the cost of surveying; also $13,000 for improvements.

VI.

The following is the account between the United States and the Shawnee tribe under treaty of 1831:

Total amount of land ceded (acres)		96,051.48
Less:		
Reserved for Joseph Parks	640.00	
" " Francis Duchouquet	320.00	
" " Hurons (the price to be held as shown in treaty)	640.00	
Difference between plats and abstracts	5.43	
		1,605.43
Acres		94,446.05

Of these acres there were sold, at 2.08\frac{3}{4}$ per acre, 9,841.27 acres, yielding $20,543.65. There remained (acres) 84,604.78, which, at $2 per acre, would have yielded $169,209.56; adding this to the $20,543.65 gives a total of $189,753.21.

There has been paid to the Shawnees:

Per 5th article treaty of 1831	$13,000.00
" 4th " " " "	6,994.00
" 7th " " " " (surveying)	1,011.00
Amount retained from sales, at 70 cents per acre	66.252.23
Total	87,257.63
From the amount due as shown above	189,753.21
Subtract	87,257.63
Balance (in 1840)	102,495.58

36	Paid to the Shawnees (September 28th, 1852) under the 7th article of the treaty of 1831	$37,180.58
	Interest on $102,495.58 from June 30, 1840, to June 12, 1393, at 5 per cent.	271,357.04
	Interest on $37,180.58 from September 28, 1852, to June 12, 1893, at 5 per cent	75,672.80
	Difference	195,684.24
	Subtract amount paid	37,180.58
	Balance	158,503.66
	Add (see *supra*)	102,495.58
	Total	260,999.24
	Add amount unpaid under treaty of 1825	1,152.78
	Total	262,152.02

VII.

Difficulties arose as to the 100,000 acres which the second article of the treaty of 1831 provided should be given the Indians, and the United States failed to perform their stipulation in this regard; because of this failure the United States paid the Ohio Shawnees $66,246.23, and received receipts stating that the moneys thus paid were "in full payment of all claim under that part of the treaty of 1831 which has relation to the grant of 100,000 acres of land in fee simple to the Ohio Shawnees." It does not appear that the amount so paid the Ohio Shawnees was insufficient compensation.

VIII.

Owing to laches or dishonesty, certain moneys due to orphan children under the treaty of 1854 with the Shawnees, to be distributed under the last clause of article 8 thereof, was lost to them. The President deemed best to pay their money over in severalty. The Shawnee council created certain so-called guardians of the orphan children, and to them the defendants paid a portion of the orphans' money, which by laches or dishonesty never reached the orphans. Another portion of the orphans' money was committed to a United States Indian superintendent for distribution; he embezzled it, and this money was lost to the orphan children.

The total amount lost to the orphan children in the manner above set fort was $10,506.39. On this amount the United States recovered from the Indian superintendent's sureties $1,068.77, and in 1884 appropriated the balance, $9,437,62, but no payment has been made, as the Secretary of the Interior and Commissioner of Indian Affairs deemed that the whole amount of the money should not go to the Shawnees as a tribe but a part at least "should be paid directly to the parties to whom it belongs."

IX.

There was paid the Shawnees for blacksmiths from 1825 to 1854 the sum of $17,408.73.

DAVIS, J., delivered the opinion of the court:

The fourth section of the act of Congress, approved the 1st day of October, 1890, provided as follows:

"That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government in the Court of Claims to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right of appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections 1, 2, and 3 of this act."

Upon the 6th day of July, 1892, an act "supplementary and amendatory" to the above act was approved by the President, which provided that the Shawnees "shall present to the said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaty, and from contract, expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them, and the United States."

Pursuant to these acts the petition in this case was filed, and in accordance with their liberal provisions the trial has been conducted. Various items of claims have been presented, which will now be considered in their order.

In the year 1825 one branch of the Shawnee tribe resided in the State of Ohio, at Wapaghkonnetta and on Hog Creek; another branch resided near Cape Girardeau, Missouri. With the latter branch of the tribe a treaty was made by the United States in 1825 (7 Stat. L., p. 284), by which the Indians ceded to the United States their lands in Missouri, and in consideration the United States agreed to give to the "Shawnee tribe of Indians within the State of Missouri for themselves and for those of the same nation now residing in Ohio, who may hereafter emigrate to the west of the Mississippi, a tract of land equal to 50 miles square situated west of the Missouri and within the purchase lately made from the Osages." Further, as the tribe had improvements upon the ceded land and would be obliged to incur expenses in removal, it was stipulatad that "for the purpose of rendering a fair equivalent for the losses and inconveniences which said tribe will sustain by removal, and to enable them to obtain supplies in their new settlements," the United States should pay $14,000, of which $5,000 was to be furnished in domestic animals, implements of husbandry, and provisions.

It was further agreed in the same treaty that, as these Indians had various claims against the citizens of the United States for spoliation, which they could not support by evidence of whites, $11,000 should be paid to the Shawnee Nation, to be distributed as they might deem equitable; it was further agreed that the United States should "support and keep a blacksmith for their use on the lands hereby assigned for the term of five years, or as long as the President may deem it advisable," and that the

United States should furnish the Shawnees the necessary blacksmith's tools and 300 pounds of iron annually.

38 It appears that the Shawnees received payments under this treaty and that the Shawnees' balance (upon these accounts), amounts to $1,152.78; with this sum the tribe will be credited. As there is no provision in the treaty for payment of interest on the moneys thus pledged to be paid, plaintiff is not entitled to the benefits of the act of April 1, 1880 (21 Stat. L., p. 70), and interest can not be allowed by us.

Defendants endeavor to set off against this item of claim certain very considerable disbursements made by them for blacksmith's pay. It appears that a blacksmith was supported by the United States for many more than five years, but the cost is not a proper charge against the Shawnees (under the treaty of 1825 or that of 1831) for discretion in this matter was entirely in the President. The treaty provided that the United States "should support and keep a blacksmith for the term of five years, or as long as the President may deem advisable." This charge was to be entirely borne by defendants, the President had full discretion as to the duration of the employment, and his action bound the United States. (A similar provision is contained in the treaty of 1831.) No charge can be made against the Shawnees on this account.

The treaty of August, 1831 (7 Stat. L., p. 355), removed the Ohio Shawnees west of the Mississippi and merged the two bands. By the first article of this treaty the Ohio Shawnees ceded to the United States their lands at Wapaghkonnetta and on Hog Creek; in consideration of this cession the United States (article 2) agreed, first, to cause the band of Shawnees to be removed, in a convenient and suitable manner, to the western side of the Mississippi River; second, to grant them by patent in fee simple a tract of land to contain 100,000 acres to be located, under the direction of the President of the United States, within the tract granted in 1825 to the Missouri Shawnees. It was further agreed in the same article that if there should not be sufficient "good land unoccupied by the Shawnee Indians who have already settled on the tract granted as aforesaid, * * * then the tract of 100,000 acres * * * shall be located * * * on lands contiguous to the said Shawnees of Missouri or on any other unappropriated lands" within a designated district. The United States (article 3) was further to defray the expense of removing the band, and there is no claim of failure in this regard. By article 4 the United States pledged themselves to build a sawmill and gristmill for the Shawnees upon the new land, to cause a blacksmith shop (to contain all the necessary tools) to be built for the Shawnees at their intended residence, and to employ a blacksmith "as long as the President thereof may deem proper." The cost of these improvements was to be paid "out of the first sales to be made of the lands" ceded by the Shawnees to the United States.

The next article (5) provides:

"ARTICLE 5. In lieu of the improvements which have been made on the lands herein ceded, it is agreed that the United States shall advance to the said Shawnees (for the purpose of enabling them to erect houses and open farms at their intended residence) the sum of $13,000, to be reimbursed from the sales of the lands herein ceded by them to the United States. A fair and equitable distribution of this sum shall be made by

the chiefs of the said Shawnees, with the consent of the people in general council assembled, to such individuals of their tribe who have made improvements on the lands herein ceded and may be properly entitled to the same."

As to this, it is contended for the plaintiff that the transaction agreed upon resulted in no advantage to the Shawnees, because if the
39 $13,000 be understood to be an advance merely, to be afterwards reimbursed from the sale of the Ohio land, the United States would receive the improvements and also ultimately the $13,000 at which they were valued. It is not alleged that the $13,000 has not been paid.

Article 7 of the same treaty provides as follows:

"The United States will expose to public sale, to the highest bidder, in the manner of selling the public lands, the tracts of land herein ceded by the said Shawnees. And after deducting from the proceeds of such sale the sum of 70 cents per acre, exclusive of the cost of survey, the cost of the gristmill, sawmill, and blacksmith shop, and the aforesaid sum of $13,000, to be advanced in lieu of improvements, it is agreed that any balance which may remain of the avails of the lands after sales, as aforesaid, shall constitute a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, 5 per centum on the amount of said balance, as an annuity, said fund to be continued during the pleasure of Congress, unless the chiefs of the said tribe or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created should be dissolved and paid over to them, in which case the President shall cause the same to be so paid, if in his discretion he shall believe the happiness and prosperity of said tribe would be promoted thereby."

Article 13 provides (at the request of chiefs) that the price of an average section of the land ceded should be reserved by the Government to be paid "the Shawnees who now reside on the river Huron, in the Territory of Michigan, for the purpose of bearing their expenses should they ever wish to follow" the Ohio Shawnees "to their new residence west of the Mississippi."

As to article 7, it will be noted that the United States were to expose the lands first "to public sale to the highest bidder," and second, that this sale was to be made "in the manner of selling the public land." The manner of selling the public land in the territory "northwest of the river Ohio and above the mouth of Kentucky River" was thus prescribed in section 4 of the act of May 18, 1796 (Stat. L., vol. 1, p. 467): "Provided always that no part of the lands directed by this act to be offered for sale shall be sold for less than $2 per acre." This direction was emphasized by the act of May 10, 1800 (Stat. L., vol. 2, p. 73), which, in section 5, provided, "that no lands shall be sold by virtue of this act at either public or private sale for less than $2 per acre; and payment may be made for the same by all purchasers, either in specie or in evidence of the public debt of the United States."

At the date of the treaty, then, it was provided by statute that no land in this section of the country should be sold for less than $2 per acre, and when the negotiators of this treaty placed in it the direction that the sale of the Shawnee lands was to be made "in the manner of selling the pub-

lic lands" they must be understood to have had in their minds the mandate of the Congress of the United States. If there were any doubt upon this point it would be solved by the act of July 14, 1832 (Stat. L., vol. 4, p. 601), which expressly provided that the lands now in question be made part of the land districts in which they were situated, "and liable to be sold as other public lands in the State of Ohio." It appears, however, that only a small portion of the Shawnee land ceded by this treaty of 1831 was in fact sold at public sale. This land brought $2.08\frac{1}{2}$ per acre. All the rest of the Indians' land was sold at private sale at $1.25 an acre. The reason for this course has not been disclosed to us.

We construe the treaty of 1831 to mean, that the Shawnees surrendered absolutely to the United States their lands in Ohio. In return for this cession they were to receive: land west of the Mississippi, the expenses of removal, an advance to pay for the sawmill and gristmill provided by article 4, the price of their lands in Ohio when these lands were sold "at public sale to the highest bidder, in the manner of selling the public lands;" an advance of $13,000, the amount which article 5 directed should be advanced to the Indians "for the purpose of enabling them to erect houses and open farms at their intended residence," and which sum it was also directed in the same article should be "reimbursed from the sales of the lands" conveyed by them. The United States were to retain, as directed by Article VII, 70 cents per acre, exclusive of certain expenses in that article set forth specifically. A reservation was also made for the Huron Shawnees. The balance produced by this somewhat complicated account was to be held as a fund upon which 5 per cent per annum should be paid the tribe unless under certain contingencies the the funds were paid over to the Indians.

The United States failed in their duty when they sold any of these lands otherwise than at public sale to the highest bidder in the manner of selling the public land, and as trustees of these Indians and their guardians, are liable to them for any loss which the Shawnees may have thus sustained. The best evidence which we have of the amount which these lands would have produced if sold according to the treaty stipulations is contained in the statutes above cited and is, therefore, fixed by us at $2 per acre. True the small amount of land belonging to the Shawnees actually sold at public sale brought a somewhat larger price, and some of the land sold at $1.25 per acre had upon it improvements; but most of the land at this rate was unimproved. We therefore believe that the statutory price of $2 was subtantially a fair valuation. Upon this branch of the case the account may be thus stated: The Shawnees will be credited with the amount received at the public sale of the land, sold at $2.08\frac{1}{2}$ per acre. They will be credited with $2 per acre for the rest of their land in the State of Ohio ceded by the treaty of 1831 as shown below. They will be debited with the amount actually received by them for the sale of these lands; with the items provided by article 4, with the sum of $13,000 prescribed in article 5, with the sum of 70 cents per acre retained by the United States, and the cost of surveying.

As the balance thus produced should have gone to the fund provided in the (seventh) article "for the future necessities of the tribe," interest at 5 per centum will be allowed upon it from the 30th day of June, 1840, the date of the last sale, the lands having been sold with reasonable expedition.

This computation allows to the Indians credit, upon the theory stated, for the entire amount of lands in Ohio ceded by them to the United States; it is, therefore, unnecessary to pursue the inquiry as to the fate of the school land, some 2,300 acres (it is said) alleged to have been diverted to school purposes under the acts of April, 1802 (2 Stat. L., p. 103, sec. 7), and March 3, 1803 (2 Stat. L., p. 225).

Section 13 of the treaty of 1831 also provides, "at the request of the chiefs," that "the price of an average section of the lands herein ceded shall be reserved in the hands of the Government, to be paid to their friends, the Shawnees, who now reside on the river Huron, in the Territory of Michigan, for the purpose of bearing their expenses should they ever wish to follow" the Ohio band. It is not shown that this
41 fund has been misapplied, or that the Michigan Shawnees have declined to move West. As far as we are informed the money is held for the contingency contemplated by the thirteenth article, and therefore, at this time the Western band have no claim to it.

The United States were unable to comply with their promise of 100,000 acres of land West, as contained in the second clause, and in the act of March 3, 1853, appropriated some sixty-six thousand and more dollars to pay Indian claims thus arising. It is sought to connect this arrangement with the sale of the Ohio lands, but we deem it an entirely distinct transaction. The treaty of 1831 contained a complete bargain, by which the Indians surrendered their Ohio lands, for which they were to be paid $2 per acre less 70 cents retained by the United States and certain charges above enumerated; they were also to be paid 100,000 acres of land in the West. This last important element in the contract was not carried out by the defendants, and for that reason the Shawnees were paid the sixty thousand and odd dollars set forth in the findings.

This payment can not be held to be a refunding of the 70 cents deducted from the price of the Ohio lands but as compensation for the failure of the United States to fulfill a treaty obligation created in 1831. The appropriating statute adopts this view when it says (10 Stat. L., p. 236): "For payment in full of all claims under that part of the treaty of eighteen hundred and thirty-one which has relation to the grant of one hundred thousand acres of land, in fee simple, to the then Ohio Shawnees, sixty-six thousand two hundred and forty-six dollars and twenty-three cents." The statute required that receipt for this money should specify that "it is in full satisfaction of such claim," and such receipts were given. The transaction, therefore, is complete; the Indians did not receive the Western lands promised, and the United States have paid for their failure in this regard. It does not appear that the payment was insufficient.

It is further alleged on behalf of plaintiff that under the treaty of 1854 the Shawnees (both bands being now united) ceded their lands to the United States and as "part consideration" therefor received 200,000 acres in the State of Kansas, the Government further agreeing to pay the sum of $829,000 in the manner following: $40,000 to be invested by defendants at not less than 5 per centum interest per annum; $700,000 to be paid in annual installments; $89,000 to be a final payment. In substance it is further alleged that the terms of the treaty have been complied with except that the Government has kept back $22,000; this sum, together with $10,000 appropriated by an act of Congress passed in 1884,

it is sought to recover here (paragraph 10 of petition). This claim is based upon certain failures to pay or a dishonesty in payment to orphan Indians of their shares under the allotments.

Article 8 of the treaty of 1854 provides that "competent" Shawnees "shall receive their portions of the annual installments in money; that the portions of "incompetent" Shawnees "shall be disposed of by the President in the manner deemed by him best alculated to promote their interests and the comforts of their families, the Shawnee council being first consulted with respect to such persons whom it is expected they will designate to their agent." This section closes with the following clause, out of which this branch of the contention springs: "The portions of orphan children shall be appropriated by the President in the manner deemed by him best for their interests."

42 It will be noted immediately that this section places upon the President a different responsibility in regard to the "incompetents" than in regard to the "orphans;" as to the former he must consult the Shawnee council; as to the latter he has absolute power and single responsibility. Some of this "orphans" money was paid to adult Indians, constituted by the Shawnee council guardians of the orphans; that is, to adult Shawnees pu'porting to be invested with power from the tribe to receive the infants' money; much money thus paid never reached its proper destination, whether through carelessness or fraud on the part of the so-called "guardians" does not appear. Other moneys intrusted to an officer of the Indian Bureau bearing the title of superintendant was misapplied and lost. All the money thus lost to individual orphan minors through no fault of theirs it is sought in this action to turn into the fund of the Shawnee tribe.

The argument upon this point, especially as to the facts, seems to us to have been confused by considerations, which, in our opinion, are not important. What the exact course was of the Indian so-called "guardians" or the superintendent, or whether fraud or whether laches occasioned the loss, or how much was lost to the orphans through the "guardians" or how much through the superintendent, we deem not to be of consequence at this time. The question is not between five parties, the United States, the guardians, the superintendent, the orphans, and the tribe; but between two, the United States and the orphans. The President was bound by section 8 to appropriate the portions of orphan children in the manner deemed by him best for their interests. His alone was the duty, power, and responsibility of caring for the money which there is no question belonged to these infant wards of the nation. The United States owed this money to the minors; there is no dispute as to this. The United States have not paid it; that is not denied. Whether the superintendent or the alleged Indian guardians stole it or lost it is not a question at issue, for a guardian can not excuse a breach of trust because of the employment by him of an incompetent or dishonest agent. The orphan Indians right to their shares of the fund was as perfect as the rights of the adults; but properly those rights were subjected to the guardianship of the United States, which through the employment of dishonest or incompetent agents lost their wards' property.

The Shawnee tribe, as a tribe, have no claim to this money; it belongs to the individual orphan children, and to them should be paid. Under the

treaty of 1854 the sum of $40,000 alone was reserved as a fund (article 3), while the annual installments were to be paid proportionately to individual Indians, with the exception that the portions of orphans should be "appropriated by the President in the manner deemed by him best for their interests." The President deemed an allotment in severalty "best for their interests," and this decision is final. In an endeavor to carry out this decision loss occurred through no fault of the children, but entirely through the laches or misconduct of agents selected by the United States. These facts can not be held to divest the orphans of their title to the stolen or lost money and to transfer this title to the tribe. Article 10 does not aid plaintiff in his contention that the tribal fund should be credited with the orphan portions, for that article forbids the United States to pay Shawnee debts with the money due under the treaty, and the orphans' share in this money was and is no more a "debt contracted by the Shawnees" than the portions paid to adult Indians.

The "orphan children" are entitled to receive as individuals from the United States the portions due them under the treaty of 1854 not already paid. In case any have died the money will go to the personal representatives according to the local law.

Congress in 1884 passed an act (Stat. L., vol. 23, p. 247) appropriating $9,437.62 toward paying the amount thus lost, but the executive officers of the Government have refused to pay over the money. This sum was directed by the statute to be paid to the Shawnees as a tribe; this the Secretary of the Interior and Commissioner of Indian Affairs failed to do, as they deemed that at least a part of the appropriation should be paid direct to the orphans, "the parties to whom it belonged." The amount thus lost to them we find to be $10,506.39.

In calculating interest we have not followed the strict rule of the common law in relation to promissory notes, as, in our opinion, the result would be inequitable to defendants.

A decree is now filed; judgment will be entered in accordance therewith.

43 VI.—*Decree entered June* 12, 1893.

At a Court of Claims held in the city of Washington on the 12th day of June, A. D. 1893, the following decree was ordered to be entered:

The Shawnee Indians, by Johnson Blackfeather, their principal chief, having, in accordance with the acts of October 1, 1890, and July 6, 1892, presented to the Court of Claims in this action their claims against the United States, founded upon the treaties between said Indians and the United States, made in the years 1825, 1831, and 1854, the said Indians being represented in this court by Charles Brownell, esq., their attorney and counsel; and the Attorney-General having designated and appointed from the Department of Justice John C. Chaney, esq., a counsellor at law competent to defend the United States; and the cause having been brought to a hearing before this court, now, upon the pleadings, evidence, briefs, and arguments of counsel, the said court doth order, adjudge, and decree that there is due said Shawnee Indians from the United States this 12th day of June, 1893, principal and interest, the sum of $262,152.02, and judgment is now entered herein in favor of said Shawnee tribe and against the defendants for this amount.

Further, there is due the infant Shawnees, described in the findings of fact and opinion filed in this case, the sum of $10,506.39, which, it is further ordered, adjudged, and decreed shall be paid to said orphans or their personal representatives, under the direction of the honorable the Secretary of the Interior.

It is further ordered, adjudged, and decreed, in accordance with
44 the provisions of said act of October 1, 1890, that there shall be paid to said Charles Brownell, attorney and counsel for said Shawnee Indians, as his compensation, the sum of twenty-six thousand two hundred and fifteen dollars ($26,215.00), which does not exceed 10 per centum of the amount recovered by said Indians, and which is to be paid out of and deducted from the said first above-mentioned sum of two hundred and sixty-two thousand one hundred and fifty-two dollars and two cents ($262,152.02).

BY THE COURT.

45 VII.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on June 12, 1893, in favor of the claimant, the defendants, by their Attorney-General, on the 22d day of June, 1893, make application for and give notice of an appeal to the Supreme Court of the United States.

HOLMES CONRAD,
Asst. Atty. General.
JOHN C. CHANEY,
Asst. Atty.

Filed June 22, 1893.

December 19, 1893. Allowed in open court.

WILLIAM A. RICHARDSON,
Chief Justice.

46 IN THE COURT OF CLAIMS.

JOHNSON BLACKFEATHER, PRINCIPAL CHIEF of the Shawnee tribe of Indians,
vs.
THE UNITED STATES. } No. 16857.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact by the court and the conclusion of law thereon, of the opinion and decree of the court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 3d day of January, 1884.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

47 (Indorsement on cover:) Case No. 15480. Term No. 1096 The United States, appellant, *vs.* Johnson Blackfeather, the principal chief of the Shawnee tribe of Indians. Court of Claims. Filed January 8th, 1894.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
JOHNSON BLACKFEATHER, THE PRINCIPAL chief of the Shawnee tribe of Indians. } No. 622.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

STATEMENT.

This suit is brought by authority of two acts of Congress, one approved October 1, 1890, and the supplementary act approved July 6, 1892. The first of these acts, after providing for suits against the Government and the Cherokee Nation upon certain claims against the latter, in its fourth section provides as follows:

> That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government, in

the Court of Claims, to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right of appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections 1, 2, and 3 of this act.

The supplementary statute provides as follows:

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States Court of Claims for adjudication under the act of Congress passed and approved October first, eighteen hundred and ninety, entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," shall present to the said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them and the United States.

The petition by Johnson Blackfeather, principal chief on behalf of the Shawnee tribe of Indians, sets up numerous distinct claims arising under different treaties. Only two of these, however, need be pressed upon the attention of the court. The first and most important

claim is allowed by the Court of Claims at the sum of $260,999.24, and is based upon the seventh section of a convention or treaty made August 8, 1831, and proclaimed April 6, 1832, between the United States and the Shawnee Indians residing in Allen County, Ohio, known as the Ohio Shawnees. That treaty involved on the one hand the cession to the United States of a tract of land in Ohio aggregating, according to the treaty, 92,800 acres, but according to the Government survey 96,051.48, and on the other the cession to the Indians of certain Western lands and the payment of various sums by the United States.

Article 7 of the treaty provides:

> The United States will expose to public sale, to the highest bidder, in the manner of selling the public lands, the tracts of land herein ceded by the said Shawnees. And after deducting from the proceeds of such sales the sum of seventy cents per acre, exclusive of the cost of surveying, the cost of the gristmill, sawmill and blacksmith shop, and the aforesaid sum of thirteen thousand dollars, to be advanced in lieu of improvements, it is agreed that any balance which may remain of the avails of the lands after sale, as aforesaid, shall constitute a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity, said fund to be continued during the pleasure of Congress, unless the chiefs of the said tribe or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created should be dissolved and paid over to them, in which case the

President shall cause the same to be so paid, if, in his discretion, he shall believe the happiness and prosperity of said tribe would be promoted thereby.

The Commissioner of the General Land Office, on behalf of the Government, sold 9,841.26 acres at public sale at the price of $2.08¾ per acre. One thousand six hundred and five acres were, by virtue of the treaty, deducted and not to be sold; the balance, excepting about 2,300 acres, as to which there is some dispute, but which was probably donated to the State of Ohio for school lands, was sold at private sale for $1.25 an acre. All sums actually received by the Government from such sales were in 1852 accounted for and paid over upon the dissolution of the fund.

The Court decides (Finding VI) that all of this land not sold at public sale as aforesaid should be accounted for by the Government at the rate of $2 per acre, resulting in a balance of $102,495.58 in excess of the sums accounted for, and on this balance of $102,495.58 allows the claimant interest at the rate of 5 per centum per annum from the year 1840, when the sales were completed, up to the date of the decree, deducting from the principal the sum of $37,180.58 paid to the Shawnees on September 28, 1852, as a final settlement and adjustment. The amount thus resulting, with interest as above stated, is $260,999.24.

The court makes no finding as to whether or not these lands had been offered at public sale and makes no finding as to their value or the price which they would have brought had they been so sold.

An indebtedness of the Government to the Shawnee tribe of $1,152.78 under the provisions of the treaty of 1825 is also adjudged by the court, and being based upon a direct finding of fact, can not perhaps be here controverted.

The other controverted item is based upon article eight of a treaty made May 10, 1854, and proclaimed November 2, 1854, wherein it is provided that the portions of certain sums to be paid by the Government, according to the items of said treaty, belonging to orphan children, should be appropriated by the President in a manner deemed by him best for their interest. This money, amounting to $10,506.39, was deemed by the President best to be paid to the orphan children in severalty. Guardians for the children were appointed by the Shawnee council. Some portions of the money were paid over to the guardians, and apparently by them embezzled, and the remainder embezzled by a United States Indian superintendent having charge of the distribution. This latter embezzlement has been made good by appropriation, and the full sum is in the Treasury, subject to payment by the Secretary of the Interior. The court decrees that this money is the property of the individual orphans or other personal representatives, and that it be paid to them individually under the direction of the Secretary of the Interior.

Under the provisions of the above-mentioned treaty of 1825 with the Missouri Shawnees, the Government undertook, by article 4, "to support and keep a blacksmith shop for the use of the Indians on the land assigned to them

after the term of five years, or as soon as the President may deem advisable, and to furnish for the use of the Shawnees the tools necessary for a blacksmith shop, and 300 pounds of iron annually." This blacksmith shop and other supplies were maintained by the Government from 1825 until 1854, and involved the expenditure of the sum of $17,408.73, but the findings are silent as to the portion of such expenditure made within the five years and that made after the expiration of that period. They are also silent as to whether the President did any act to indicate his decision as to the advisability of the maintenance of such establishment after the treaty term of five years.

The defendant counterclaims for a set-off of such amount as was expended after the expiration of the five years against any balance due the Shawnees. The court disallows any offset whatever in favor of the Government for this additional expense.

ASSIGNMENT OF ERRORS.

1. The decree of the court is erroneous in ordering, adjudging, and decreeing that there is due the petitioner the sum, principal and interest, of $262,152.02, on account of the matters set up in the first and second of the three claims aforesaid.

2. The court erred in adjudging and decreeing that the defendants are indebted to the petitioner in the case of either of said two claims.

3. The court erred in that it allowed interest in the case of the second of said claims from the year 1840 to the time the decree was entered.

4. The decree of the court is erroneous in ordering, adjudging, and decreeing that there shall be paid $10,506.39 to certain orphans or their personal representatives, under the direction of the Secretary of the Interior.

5. The decree is erroneous in ordering, adjudging, and decreeing that there shall be paid to Charles Brownell, attorney, $26,215.

6. The court erred in disallowing the set-off and counterclaim of the defendants.

ARGUMENT.

I.

The principal question in this case is whether the lower court has rightly decreed that the appellee recover $260,999.24 on account of an alleged injury done to the Shawnee tribe by selling certain lands in Ohio at *private* sale for $1.25 per acre instead of at *public* sale for $2 per acre.

The convention of August 8, 1831, between the United States and certain Shawnees provided for the cession by the latter of 92,800 acres in Ohio upon certain considerations, and article 7 provided that the United States would "expose to public sale to the highest bidder, in the manner of selling the public lands," the tracts of land ceded. After certain deductions, the proceeds were to constitute a fund for the future necessities of the Indians, and the Government was to pay them an annuity of 5 per cent thereof.

The Court of Claims find that some of the lands were sold at public sale for $2.08 per acre, but the rest at *private* sale for $1.25 per acre, which they hold to be in violation of this convention.

That the convention forbade a selling at "private sale" is supposed to be clear from the language above quoted; and that the convention was violated by a sale at $1.25 per acre is supposed to be established by the fact that some of the land sold for $2.08 at public sale, coupled with the mistaken assumption that the laws in force at the time of the treaty fixed $2 as the minimum price for selling public lands. The acts of Congress of May 18, 1796, and May 10, 1800, are relied upon as establishing that "the manner of selling the public lands" meant at a minimum of $2 per acre. This legal minimum with the actual sales at $2.08 demonstrates to the satisfaction of the court that the lands were worth $2 per acre, and consequently the damages are fixed on a basis of the difference between $1.25 per acre and $2 per acre.

In all this the court is mistaken in its law, its logic, and its assumptions.

The convention of 1831 does not require a *sale* of the lands at public sale and exclude sales at private sale. It only requires that the lands shall be "exposed to public sale, to the highest bidder, in the manner of selling the public lands."

Whether they were so "exposed" the court does not find, but the inference that they were is rendered very strong by the fact that nearly 10,000 acres were struck off and sold. The evidence discloses that such public sales were effected between December 24 and December 31, 1832,

and before any private sales were made. This of course is not before this court on appeal, but the presumption, *omnia rite acta*, would undoubtedly warrant the conclusion, nothing appearing to the contrary, that the public officers obeyed the law and exposed these lands to public sale before making private sales.

Not being all sold, the remainder were kept on sale at private sale until disposed of. All this was precisely in "the manner of selling the public lands;" it is the manner that has prevailed for a century; and the treaty could have intended nothing else, unless it intended that after the offering at public sale and a failure to sell, the lands were not to be sold at all or were to be repeatedly again offered at public sale. The former construction would be absurd, and the latter a wide departure from "the manner of selling the public lands." The convention required the United States simply to expose to public sale, not to sell at public sale, nor to offer repeatedly at public sale until all should thus be sold. So far, therefore, as the private sales are concerned, the convention was fulfilled by the Government according to its letter and its spirit.

As for the proposition that the convention, in adopting "the manner of selling the public lands," required a sale at not less than the minimum price fixed by the acts of 1796 and 1800, the court is quite mistaken in saying that "at the date of the treaty then it was provided by statute that no land in this section should be sold at less than $2 per acre." The act of April 24, 1820 (3 St. L., p. 566), had fixed the minimum of $1.25, the price at which the lands were actually sold at private sale. The

court say, "why the rest of the Indians' land was sold at private sale at $1.25 per acre has not been disclosed to us." The act of April 24, 1820, which has been law from that day to this, discloses the reason. It is but just to the Court of Claims to state, however, that this act does not appear to have been brought to its attention by the briefs of either party.

If the court should desire to know whether the rule which binds it to accept as facts whatever the lower court finds must prevent us here from reaching the real truth of the matter, the answer is that there is no such obstacle. It is not found by the court that the United States did not expose the lands at public sale as required by the treaty. On the contrary, the findings show that there was an offering at public sale, for they set forth distinctly that the first *sales* were "at public sale to the highest bidder at the rate of $2.08¾ per acre."

While we do not think this case should again be gone over in the lower court, it may be well to point out that the findings of fact omit one which is essential to the decree, namely, the value of the land supposed to have been sold in violation of the convention. Without that fact the existence and extent of the *injury* are not shown. The *opinion* can not supply this omission in the findings. (*Saltonstall* v. *Birtwell*, 150 U. S., 417.)

II.

The item of $260,999.24 is made up of the sum of $65,315, the damages resulting from failure of the Government to realize $2 per acre, and interest thereon from

1840, when the sales land were completed, up to the date of the decree.

The right of claimants to such interest is by no means clear. The Government can not be charged interest unless brought clearly within the provisions of section 1091, Revised Statutes.

> No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims unless upon a contract expressly stipulating for the payment of interest.

This statute, being one for the protection of the Government and a limitation of the privilege granted by chapter 21, Title XIII, Revised Statutes, must be construed strictly against the claimant.

Under the treaty of 1831, the only stipulation which could be tortured into support of interest allowance is that the United States agree to pay to the chiefs "annually five per centum on the amount of said balance as an annuity."

This is very far from an express stipulation to pay *interest*. An agreement to hold a fund, pay an annuity measured by a percentage thereon, and to divide or otherwise apply the fund, is not an agreement to pay interest.

But conceding for the moment the sufficiency of this stipulation to support a claim for interest on the balance of the proceeds actually received, it can go no further. It can not support a claim for interest upon unliquidated damages, moneys which never came into the hands of the Government, and never in fact became a part of the fund. It must be borne in mind that the Government has

accounted for and paid annuities to the amount of 5 per cent on the balance of the actual proceeds of the land sold, which is full and exact compliance with the written stipulation.

The impropriety of the allowance of these damages and interest thereon from 1840, the date when sales of the land were actually completed at $1.25 per acre, is rendered perfectly obvious when we remember that the damages are predicated on the assumption that the Government was bound to sell all of this land *at public sale*—and at not less than $2 per acre; and that the interest is predicated on the assumption that sales so made would have been completed in 1840.

The two are utterly inconsistent. We can not form any idea when the land would have been sold had $2 per acre been insisted on, but we can be perfectly certain that it would have found market only at much later date than at $1.25, and we can also be entirely sure that the cumbersome machinery of repeated auction sales would have entailed much additional expense, which, by the terms of the treaty, was to be deducted from the proceeds. It is apparent that while sufficient facts are not disclosed to render certain the correct amount to which claimants would be entitled, upon the view taken by the court, they are abundant to establish that the amount found is erroneous and excessive.

Again, this written contract, on which alone claimants can rely for interest, bound the Government to pay this 5 per cent annuity only until the dissolution of the fund, which might be accomplished either by act of Congress

or at the election of the Indians, with approval of the President. Such dissolution took place September 28, 1852, and the sum of $37,180.58, the amount of the fund resulting from actual sales, was paid over to the chiefs of the tribe and was accepted in full satisfaction. Clearly this terminated the contract provision for annuity. Since that time, whatever the previous conditions, the relationship has been merely that of a debtor for unliquidated damages, for payment of interest whereon no pretense of written stipulation exists. (*Tillson* v. *U. S.*, 100 U. S., 43.)

III.

As for so much of the decree of the lower court as concerns $10,506.39, which the court say the Government owes to certain individual "infant Shawnees," there seems to be no more authority granted by the acts of 1890 and 1892 (under which the court professes to act) for making an allowance of such a claim than there is for the extraordinary order given by the court to the Secretary of the Interior.

Congress did not, in those laws, provide for any but tribal claims as such, while these are wholly individual.

Moreover, those so-called "orphans" (thus described in 1854) have presented no claim, nor has any one pretending to be their attorney.

The decree deprives the President of all further discretion or control as to the disbursement of this fund which by the terms of the treaty was to be "appropriated by him in the manner deemed best for their interests."

IV.

The counterclaim, or set-off claimed by the Government, should have been allowed at least to the extent of canceling the claim allowed by Finding II, arising as it does upon the same article of the same treaty, viz, article 4 of treaty of 1825. Thereby the Government agreed, first, to pay $11,000, and, secondly, to maintain a blacksmith shop for five years, or so long as the President may deem advisable. The Indians were paid directly all of the $11,000, except $1,152.78, and received the benefit of expenditure of Government money in maintenance of blacksmith shop and supply of tools and iron therefor for twenty-four years after the expiration of the five years, viz, until 1854. It is not ascertained exactly what amounts were so expended each year for claimant's benefit, but $17,408 were expended in twenty-nine years (Finding IX), and the amount of which they received the benefit beyond the contract requirement certainly much exceeds the balance of $1,152 remaining unpaid of the $11,000. There is neither evidence nor finding that the President in any way directed, authorized, or approved these expenditures beyond the contract term of five years.

V.

The portion of the decree which awards to Charles Brownell, attorney and counsel for the Shawnee Indians, the sum of $25,215 appears to us entirely unsupported and unauthorized by the acts of Congress conferring jurisdiction or by any facts found by the court. An examina-

tion of the statutes under which this jurisdiction is conferred makes it apparent that the first three sections of the act of October 1, 1890, authorize only suits by certain adopted citizens of the Cherokee Nation against that nation conjointly with the United States to establish their rights in tribal funds and have no relation to the present action.

It is provided in section 3, with reference to the suits against the Cherokee Nation, that the said Shawnees, Delawares, and freedmen, claimants, may be represented by attorneys and counsel, and the court is thereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the sum to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen.

Section 4, which is the only portion of the act conferring jurisdiction over the present suit, contains no such provisions with reference to claimants' attorneys or counsel in this suit, nor does the supplementary act of July 6, 1892. While of course this allowance does not increase the amount of the judgment against the defendant, the the U. S. Government is interested to such an extent as to have the right to object, for that it stands in the position of guardian for these Indian tribes, and any undue depletion of their funds may well result in increased burdens upon the Government for their care and support. Many such burdens have been assumed by the Government independently of any contract obligation, but merely in performance of the moral duty resting upon it in its capacity as guardian.

Even if such decree had been authorized by the acts conferring jurisdiction, the findings are entirely silent as to the quantity or value of the services rendered by the claimants' attorney. The amount is large, more than five times the annual salary of the officer of the Government charged with the defense of the same action. It seems to us improper that this amount should be decreed out of the funds of the Indians with no finding of fact to justify it.

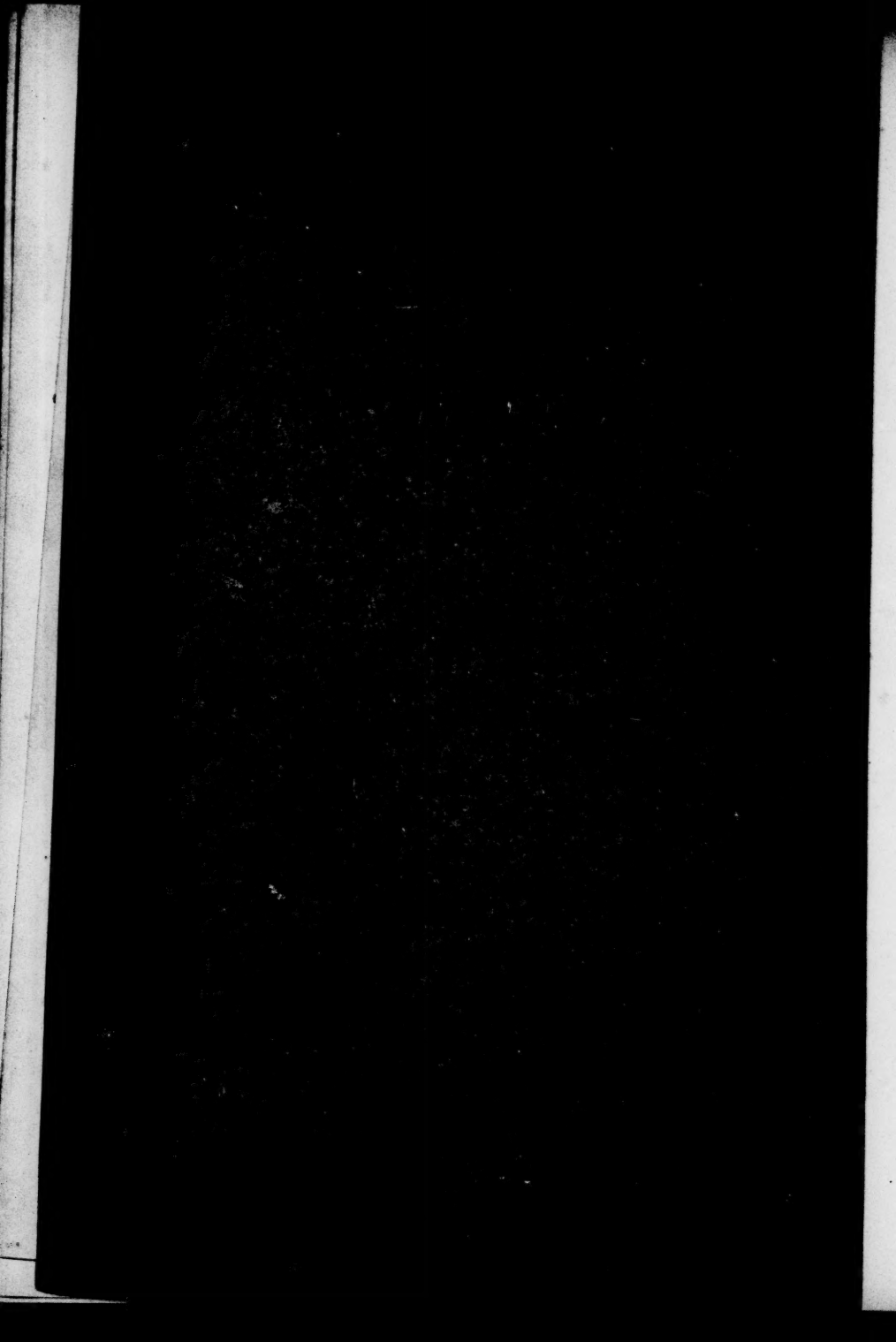
VI.

Finding 2 does not state facts enough to justify the allowance, after three-quarters of a century, of $1,153 to the Shawnee tribe, trustee under article 4, treaty of 1825, with what has long since become a dry trust.

The decision of the lower court should be reversed and the petition dismissed.

Respectfully submitted.

J. E. DODGE,
Assistant Attorney-General.
CHARLES W. RUSSELL,
Assistant Attorney.



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Under the provisions of the articles of the treaties of 1825 and 1831 the Court rendered a judgment against the United States on the said 12th day of June, 1893, principal and interest, for the sum of $262,152.02, and an additional sum of $10,506.39, in judgment, due the orphans of these Shawnee Indians. An order is also made decreeing to the attorney of record, for services rendered as such attorney and counsel, the sum of $26,215.

It is submitted that the pleadings, proofs, and findings of facts in the record fully support and sustain the decree and judgment of the Court of Claims, and that instead of the amount found due to these Shawnees by the Court of Claims they should have by said record judgment for the sum of $2,548,730.33.

Counsel for the appellee show errors in the finding of facts and allowance of the amounts of the claims respectively by the Court of Claims in this record under the provisions and obligations of the articles of the treaties of 1825, 1831, and 1854, and the acts of Congress passed and approved October 1, 1890, and July 6, 1892, referring these claims to the Court of Claims and providing an appeal to the Supreme Court of the United States:

1. That the Court erred in refusing to allow the appellee interest on the sum of $1,152.78, at five per cent. per annum, under the provisions of the treaty of 1825, as authorized by the acts of Congress passed and approved April 1, 1880, and section 3659 of an act passed and approved September 11, 1841, of the Revised Statutes of the United States. (Rec., p. 34, II finding of facts, and Rec., p. 24.)

2. The Court erred in refusing to allow the appellee the claim of $13,000 against the appellant, and interest, under the provisions of the fifth and seventh articles of the treaty of 1831. (Rec., VI finding of facts, pp. 21, 24, 25.)

3. The Court erred in refusing to allow the appellee the sum of $67,236.05, with interest at five per cent. per annum,

under the provisions of the seventh article of the treaty of 1831. (Rec., p. 6; VI finding of facts, Rec., pp. 21 and 24.)

4. The Court erred in refusing to allow the appellee the sum of $37,180.50, with interest, under the provisions of the seventh article of the treaty of 1831 (Rec., p. 6; VI finding of facts, Rec., pp. 21 and 26), and erred in charging the appellee $37,180.50, and then computing interest on the said amount at five per cent. per annum from September 28, 1852, to June 12, 1893, making $75,672.80, and charging this appellee with this amount, and deducting the two amounts from the total amount due this appellee. (VI finding of facts, Rec., p. 22.)

5. The Court erred in refusing to allow appellee the sum of $68,491.28, with interest at five per cent. per annum, under the provisions of the seventh article of the treaty of 1831. (Rec., p. 7; VI finding of facts, Rec., pp. 21 and 26.)

6. The Court erred in refusing to allow appellee the sum of $6,262.50, with interest at five per cent. per annum, as provided by the seventh article of the treaty of 1831. (Rec., p. 9; VI finding of facts, Rec., p. 21.)

7. The Court erred in refusing to allow appellee the sum of $32,000, with interest at five per cent. per annum, under the provisions of the third article of the treaty of 1854. (Rec., p. 13; VI finding of facts, Rec., pp. 21, 28, and 29.)

8. The Court erred in refusing to allow annual rests in computing the interest on the several amounts found to be due the appellee as provided by the seventh article of the treaty of 1831 and the third article of the treaty of 1854 (VI finding of facts, Rec., pp. 21 and 29), and in fixing the time when interest should begin and be computed from dates. (Rec., p. 22.)

here provided for shall be as provided for in sections 1, 2, and 3 of this act." (Rec., p. 17,)

It is submitted that the authority in this act and the subsequent amended and supplementary act gives to the courts full power and jurisdiction in the case at bar, and is within the rule laid down and decisions and opinions of the courts bearing on this question and the rules thereunder promulgated in the cases cited and in the cases of Wischart *vs.* Dauchy, 3 Dallas, 321; Story, Commentary on the Constitution of the United States, vol. 3, p. 507; 9 Wheat., 819; and in this connection it is proper to add: Where the United States assumes and performs the act or acts of a private citizen, in such a transaction the United States Government is divested of its sovereign character and takes that of a private citizen. (Story, J., 11 Pet., 349.)

Claim under the Treaty of 1825.

The Court's attention is first directed to the allegation of the petitioner (Rec., p. 1) that these Shawnee Indians were in possession and occupied a tract of land near Cape Girardeau, in the State of Missouri, under the stipulations of an agreement and permit from the Spanish government granted to these Shawnee Indians by Baron De Carondelet on the 4th day of January, 1793, containing about twenty-five miles square of land (Rec., p. 20). The Court will find, referring to the first finding of facts by the Court of Claims (Rec., 20), the said grant, as copied and interpreted for the Court of Claims. This tract of land was acquired by the United States under the provisions of the treaty of cession made between the United States and the French Republic April 30, 1803, commonly known as the "Louisiana purchase."

Article 6 of this treaty is as follows:

"The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians" [who may occupy any of the

above-described land or lands] "until by mutual consent by the said tribes or nations other suitable articles shall have been agreed upon." (Pub. Domain, p. 96.)

It is submitted by counsel that this article provided for the continuing of the interests which these Shawnee Indians were granted—an interest in and to these lands by the said cession from the Spanish government—under the provisions of the said agreement and permit, and that these Indians were independent in their possessory right and occupation of these lands and capable of entering into a treaty compact with the United States for the cession of these lands to the United States, and that the consideration named, made, and agreed to in the treaty bound and obligated the United States equally and with the same force as if these Indians had been at the time subjects of an alien power or an independent nation and separate in their government and not sustaining any relations to the United States or under any obligations thereto. The Court's attention is now further directed to Record, pages 2 and 20, where it will be seen that these Shawnee Indians and the United States made and entered into articles of treaty compact on the 7th day of November, 1825, which treaty was proclaimed December 30, 1825 (7 Stats., 284), by which these Indians ceded to the United States these lands in Missouri, for which the United States, in consideration of this cession, agreed to give to the Shawnee tribe of Indians that then occupied these lands, for themselves and for the same nation of Indians then residing in Ohio, a tract of land equal to fifty miles square, situated west of the Missouri, and within the purchase lately made from the Osages, and that, in addition, the United States further agreed to pay to these Shawnee Indians $14,000; $5,000 of this amount was to be furnished in domestic animals, implements of husbandry, and provisions (Rec., pp. 2 and 23); and a further sum of $11,000 for the purposes stated in the said articles of the

treaty, and further to keep a blacksmith for these Shawnee Indians on the land here assigned for the term of five years, or as long as the President may deem it advisable; and the United States should furnish these Shawnees the necessary blacksmith tools and three hundred pounds of iron annually (Rec., p. 20). Under the second finding of facts by the Court of Claims (Rec., p. 20) the Court say: "The Missouri band of Shawnees have received payments under this treaty of 1825, but the following balance remains unpaid, $1,152.78." With this sum the tribe will be credited (Rec., p. 24). This amount is shown and credited in the statement of the account made by the Court of Claims under the VI finding of facts (Rec., p. 22). The honorable Court of Claims, in the opinion rendered in this case (Rec., p. 24), says:

"As there is no provision in the treaty for payment of interest on the moneys thus pledged to be paid, plaintiff is not entitled to the benefits of the act of April 1, 1880 (21 Stats., 70), and interest cannot be allowed by us."

Counsel for the appellee here takes issue with the honorable Court of Claims, and avers error in this portion of the opinion presented in this case, disallowing interest on this amount, and shows error in this finding of facts, as appears in this record. This amount of $1,152.78 is admitted here to be the balance due to these Shawnee Indians under the provisions of the articles of the treaty of 1825. The act of Congress of April 1, 1880, which the Court cites and refuses to allow the interest on the above amount, is as follows:

"That the Secretary of the Interior be, and he is hereby, authorized to deposit in the Treasury of the United States any and all sums now held by him, or which may hereafter be received by him as Secretary of the Interior and trustee of various Indian tribes on account of the redemption of United States bonds or other stocks and securities belonging to the Indian trust fund, and all sums received on account

of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interest of the Indians will be promoted by such deposits in lieu of investments, and the United States shall pay interest semi-annually from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress." (21 Stats., p. 70.)

Again, it will be observed that the Court says in this opinion that there is no provision in the treaty for payment of interest on the moneys thus pledged to be paid; plaintiff is not entitled to the benefits of this act of April 1, 1880. Returning to the act as above set out, the Court will observe the provision and direction for the payment of interest to these Indian wards is as follows:

"And the United States *shall pay interest semi-annually from the date of deposit of any and all such sums in the United States Treasury at the rate per annum stipulated by treaties or prescribed by law.*"

The question presented is, What is the law? Section 3659 Rev. Stat. is as follows:

"All funds held in trust by the United States and the annual interest therefrom, when not otherwise required by treaty, shall be invested in stocks in the United States bearing a rate of interest not less than five per cent. per annum."

Counsel submits that this amount of $1,152.78, admitted to be due to these Shawnees, comes within the description and definition of the wording of this statute (April 1, 1880), as the amount is derived from the sale and disposal of these Missouri lands, under the provisions of the articles of the treaty of 1825, and section 3659 Rev. Stat. fixes the amount of interest to be allowed, and that in right, justice, and equity, under the provisions of the statute referring these claims

to the Court of Claims and providing an appeal to this Court (Rec., pp. 16 and 17), this sum of $1,152.78 should draw 5 per cent. interest from May 20, 1826 (4 Stats., 181), as this is the time the appropriation was made by Congress for the purpose of carrying out the provisions and directions of this treaty of 1825, and that 5 per cent. per annum should be computed on the said sum of $1,152.78 from the said May 20, 1826, up to and including the present time, in in compliance with the directions and provisions of the said above acts of Congress, and should be adjudged and decreed by this Court to be due to these Shawnee Indians in addition to the amount allowed to them as appears in the sixth finding of facts by the Court of Claims (Rec, p. 22). Taking the date May 20, 1826, and deducting that time from May 20, 1894, gives a result of 68 years, which the Government, the appellant, has held this money. The interest on this sum for one year, at 5 per cent. per annum, is $57.65 This multiplied by 68 gives a result of $3,920.20; adding the principal, $1,152.78, to this amount gives a sum total on this account for the amount due under the articles of the treaty of 1825 to these Shawnee Indians of $5,072.98, which amount counsel respectfully submits for the consideration of this Court.

Land Claims by Treaty of 1831.

Counsel for the appellee directs the Court's attention to the claims made in this record in favor of these Shawnees under the provisions of the treaty of August 8, 1831. (7 Stats., 355.)

The allegation of the petitioner (Rec., p. 3), is that prior to August 8, 1831, a part of these Shawnees owned, possessed, and occupied a tract of land in the State of Ohio, granted to the said Shawnee Indians by patent in fee-simple, under and by virtue of a treaty made by and between the United States Government and these Shawnee Indians on the 29th day of

September, 1817 (proclaimed January 4, 1819), (7 Stats., 160), containing one hundred and twenty-five sections or square miles of land, and also an additional tract of land ten miles square, and a tract of land twenty-five miles square. These two tracts or reservations of land were granted to the said Shawnees by patents signed by the Commissioner of the General Land Office and certified to by the Secretary of War, bearing date of April 20, 1821; also one other tract of land, containing twelve thousand eight hundred acres of land, granted by the second article of the treaty made at St. Mary's, in the State of Ohio, on the 17th of September, 1818 (proclaimed January 4, 1819), all lying together and in one contiguous tract of land in the said State of Ohio (art. 1, treaty of 1831, 7 Stats., 355). In the third finding of facts the Court of Claims, says (Rec., p. 35): "The total amount of lands here ceded, under this article of this treaty, is 96,051.48 acres."

Counsel submits that these lands were granted and patented to the Shawnee Indians and were their own, as much as any property can be owned and possessed by citizens of the United States, and owned under the laws of the country, with the exception that these Indians could not sell or dispose of the lands, except to the United States, or to some one with the assent of the United States expressed in an act of Congress, but that the laws and rules defining and governing grants, and patents, trusts, and powers to sell lands are applicable to this case.

GRANTS.

A grant is a contract within the meaning of the Constitution. A grant is a contract executed, and a party is always estopped by his own grant. A party cannot pronounce his own deed invalid, whatever cause may be assigned for its invalidity, and though that party be the legislature of a State. A grant amounts to the extinguishment of the title

of the grantor and implies a contract not to reassert that right. A grant from a State is as much protected by the operation of the provisions of the Constitution as a grant from one individual to another, and the State as much inhibited from impairing its own contracts or a contract to which it is a party as it is from impairing the obligations between two individuals (Fletcher *vs.* Peck, 6 Cranch, 87; The State of New Jersey *vs.* Wilson, 7 Cranch, 164). Government cannot revoke a grant, even of its own funds, when given to a private person or to a corporation for special uses; nor is a grant less a contract though no beneficial interests accrue to the possessor. If a grant of franchise be made to A in trust for a special purpose, the grant cannot be revoked and a new grant be made to A, B, and C for the same purpose without violating the obligations of the first grant (Dartmouth College *vs.* Woodard, 4 Wheaton, 518). A compact between two States is a contract within the constitutional prohibition. The terms contract and compact are synonymous (8 Wheat., 1). A distinction is to be noted between the rights of State citizenship and the rights of citizenship of United States citizens: the former may be conferred by a State acting for itself; the latter are within the sole disposition of the United States (4 Wheat., 316). Under the provisions of this authority it is submitted by counsel that under the provisions of article I, section 8, clause 3, of the Constitution of the United States, the Congress of the United States has the sole and full disposition of the subject-matter and the control over the parties to this case, present and claiming here. The rule presented in construing such grants is: where the grant is founded on a valuable consideration, the grant is construed favorably to the grantee. (Charles River Bridge *vs.* Warren Bridge, 2 Pet., 489, 598; Hyman *vs.* Reed, 13 Cal., 444, 452, 455, 458; Commonwealth *vs.* Roxbury, 9 Gray, 492; Martin *vs.* Waddell, 16 Vet., 411.)

A grant may be made by law as well as by patent pursuant to law and under the provisions issued by the law,

and where the assent of the President is required to give effect to a grant, and when once given it cannot be revoked (Grignon *vs.* Astor, 2 How., 319), and a confirmation by law is as fully, to intents and purposes, a grant as if it contained in terms a grant *de novo*, and such a grant or confirmation vests an indefeasible and irrevocable title (Strother *vs.* Lucas, 12 Pet., 454; Chouteau *vs.* Eckhart, 2 How., 372; Chillifoux *vs.* Ducharme, 8 Wis., 306; Terrett *vs.* Taylor, 9 Cranch, 50; Wilkinson *vs.* Leeland, 2 Pet., 657, 257, 662). As a general proposition, a patent is necessary in order to pass a perfect and consummate title to public lands, with one exception, namely, where an act of Congress grants lands with words of present grant. (Wilson *vs.* Jackson, 13 Pet., 516; Grignon *vs.* Astor, 2 How., 319.)

It will be seen by the preamble and introductory clause to this treaty of August 8, 1831, that the President of the United States, under the authority of the act of Congress approved May 28, 1830 (4 Stats., 411), appointed a special commissioner to confer with the different Indian tribes residing within the constitutional limits of the State of Ohio, to offer for their acceptance the provisions of the before-recited act; that on the 8th day of August, 1831, at Wapakoneta, county of Allen (now Auglaize county), in the State of Ohio, these Shawnee Indians, by their representatives, and the United States Government, by its representatives, made and entered into a treaty with the said Shawnees, and the United States Government, the appellant. In consideration of the provisions and stipulations therein made and covenants, obligations, agreements, and promises made by the United States Government these Shawnee Indians ceded to the United States the lands so granted to them, described and bounded as set forth in the first article of the treaty of August 8, 1831. (Rec., p. 3.)

By the stipulations and provisions of the second article of the treaty of 1831 the United States agreed with these Shawnees (1) to move the said Shawnees from the lands in

said Allen county, in the State of Ohio, to the west side of the Mississippi river, and (2) to give and grant to these Shawnees, by patent, in fee-simple forever, as long as they shall exist as a nation and remain upon the same, a tract of land to contain one hundred thousand acres (100,000), to be located under the direction of the President of the United States within the tract of land, equal to fifty miles square, which was granted to the Shawnee Indians of the State of Missouri by the second article of the treaty of November 7, 1825. (Rec., p. 4.)

By the third article of this treaty the United States agreed to defray the expenses of the removal of these Shawnees, and also to supply them with provisions for one year after they arrived west of the Mississippi river. (Rec., p. 4.)

By article 4 of this treaty the Government stipulated and provided that out of the first sales to be made of these lands that the Government would cause to be built a good and substantial saw-mill and a grist-mill, and also a blacksmith shop, and a blacksmith should be employed by the Government as long as the President may deem proper.

By article 5 of this treaty the Government, the appellant, stipulated and promised that, in lieu of the improvements which have been made on the land herein ceded to advance to these Shawnees the sum of $13,000 for the purposes of enabling these Shawnees to build houses and open farms at their new residence, and this amount was to be reimbursed from the sales of the lands herein ceded by them to the United States, as described in the first article of this treaty.

By article 6 of this treaty the Government stipulated and promised that the farming utensils, live stock, and other chattel property which these Shawnees then owned, and were not able to carry with them, should be sold, under the superintendence of some suitable person, appointed by the Secretary of War for that purpose, and the proceeds were to be paid over to the owners of such property respectively.

By article 7 of this treaty the Government, The appel-

lant, covenanted that the United States shall expose to public sale, to the highest bidder, in the manner of selling public lands, the tracts of land herein ceded by the said Shawnees, as described in article 1 of this treaty; and after deducting from the proceeds of such sales the sum of 70 cents per acre, exclusive of the cost of surveying, the cost of the grist-mill, saw-mill, and blacksmith shop, and the aforesaid sum of $13,000, to be advanced in lieu of improvements, it was agreed that any balance which may remain of the avails of the lands, after sale as aforesaid, shall constitute a fund for the future necessities of the said Shawnee tribe, parties to this compact, on which The United States, the appellant, agreed to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance as an annuity, said fund to be continued during the pleasure of Congress, unless the said chiefs of the said tribe or band, by and with the consent of their people, in general council assembled, should desire that the funds thus created be dissolved and paid over to them; in which case the President shall cause the same to be so paid if, in his discretion, he shall believe the happiness and prosperity of said tribe should be promoted thereby. (Rec., pp. 4, 5.)

The averment of the petitioner (Rec., p. 5) is that there was 96,051.48 acres of this land, and the third findings of fact (Rec., p. 21) support and agree with this averment of the petitioner.

The petitioner contends in his averment (Rec., p. 5), in relation to the 70 cents per acre, provided for the retention by the appellant out of the proceeds of the sale of these lands, to be the price to be paid for the 100,000 acres of land west of the Mississippi river in Missouri, is and was a false and unauthorized construction of the seventh article of the said treaty on this item.

The true construction submitted is that these lands (Ohio lands) should not be sold for a less price per acre than their

sale at public auction would bring, and that the said lands should be exposed and sold at public sale to the highest bidder, as provided in the seventh article of this treaty, and that the said amount of 70 cents per acre should be paid to the Shawnee Indians, the plaintiff below in this case, and the amount over and above 70 cents per acre realized from the proceeds of the sale of the said lands was to be set aside to create the fund for the future necessities of these Shawnee Indians. (Rec., p. 26.)

This transaction cannot be considered in any other way than a trust and a power created by these articles of this treaty of 1831 for the appellant to sell and dispose of these lands and all the property enumerated in the said several articles of the treaty, and the rules of law in relation to and governing such transactions rule and govern this case and are applicable to all the features of the case in question as shown in the record presented.

Sale of Land under a Power.

In making a sale under a power, * * * the power must be strictly pursued as to time, place, and manner of sale. * * * (Strother *vs.* Law, 54 Ill., 413, 418; Hall *vs.* Town, 45 Ill., 593.)

There must be a strict adherence not only to the substance of the power, but also to all the formalities required in its execution by the instrument. These formalities are required for the protection of those persons whose rights may be defeated by the exercise of the power, and to prevent the donee of the power from acting with haste and without proper consideration (Ferry *vs.* Liable, 31 N. J., 566; Holmes *vs.* Coghill, 7 Vercy, 506). It is competent for the parties to fix the terms on which the sale is to be made, and the terms of this power must be strictly pursued or the sale will be void (Wash. Real Property, vol. 2, p. 72, 5th edition; Longworth *vs.* Buttler, 3 Gilm., 32, 39; Cooper *vs.* Crosby, 3 Gilm., 506;

Hoffman *vs.* Anthony, 6 R. I., 282; Roarity *vs.* Mitchell, 7 Gray, 243; Smith *vs.* Provin, 4 Allen, 516; Bradley *vs.* Chester V. R. R., 36 Penn. St., 141, 151), and is liable in damages for his failure (Hood *vs.* Adams, 124 Mass., 481, 484; Fenton *vs.* Torry, 133 Mass., 138). If the execution of such a power be prescribed by a particular method, it implies that the mode proposed is to be followed, and it contains a negative upon every other mode (Joy *vs.* Gilbert, 2 P. Wm., 13), and in another case in this connection it is laid down that where the directions in the power to sell land are specified and under the directions and provisions of a statute will preclude any and all departure from such directions (Mills *vs.* Banks, 3 P. Wm., 1). It is submitted that the power created for the sale of these Ohio lands is by law of this treaty, and that the rule presented applies to this case.

Trusts.

Trusts are defined as executory and executed. Trusts executed are where the limitations of the equitable interests are complete and final. In the trust executory the limitations of the equitable interests are *not* intended to be complete or final, but merely to serve as minutes and instructions for perfecting the settlement at some future period (Lewin, Trusts, 45; Dennison *vs.* Goehring, 7 Penn. St., 175). Chancellor Kent, in explaining these terms, says: "A trust is *executory* where it is to be perfected at a future period by a conveyance or settlement, as in the case of conveyance to B in trust to convey to C. It is *executed* either when the legal estate passes, as in a conveyance to B in trust for the use of C, or when only the equitable title passes, as in the case of a conveyance to B to the use of C in trust for D. The trust in this last case is executed in D, though he has not the legal estate." (4 Kent's Com., 304, 305; Wash. Real Prop., 527, 528, vol. 2, 5th ed.)

An executory trust merely declares a general plan or out-

line to be carried out in detail according to the apparent intention of the creator of the trust. An executed trust is a final and complete declaration by the person raising the trust of what it is and leaving nothing for the trustee to do to define and settle it (Saunders *vs.* Edwards, 2 Jones (N. C.) Eq., 134; Willis, Trusts, 29; 1 Cruise's Dig., 403; Porter *vs.* Doby, 2 Rich. Eq., 49; Tud. Lead., 503; Evans *vs.* King, 3 Jones (N. C. Eq.), 387). Lord St. Leonards thus distinguishes between the two: "All trusts are in a sense executory because a trust cannot be executed except by conveyance, and therefore there is always something to be done; but that is not the sense in which a court of equity considers an executory trust as distinguished from a trust executing itself." (Ederton *vs.* Brownlow, 4 H. L. Cas., 10, 210.)

A direction in a trust that the trustee shall, upon the termination of the trust, convey to certain persons in fee does not make the trust an executory one (Cushing *vs.* Blake, 30 N. J. Eq., 689; Wash. Real Prop., vol. 2, 5th ed., pp. 527, 528). The declaration of the trust is the direction for the disposition of the land. (Croxall *vs.* Shepard, 5 Wall., 281.)

It is submitted by counsel that the land in question, in this case before the court, was held in trust by the United States under the declarations and directions of the articles of the treaty of August 8, 1831, with these Indians and for these Indians, to be sold and the proceeds to be distributed as therein directed in the several articles of the treaty. These directions and declarations must be strictly followed and complied with, and, as a consequence of the double character of this trustee, the United States, and appellant in this case, it is not too much to consider the trustee as the agent for both parties, and the trustee's action in performing the duties of this trust must be conducted with the strictest impartiality and integrity. Courts of equity watch such proceedings with a jealous and scrutinizing eye. (Goode *vs.* Comford, 39 Mo., 313; Equit. Tr. Co. *vs.* Fisher, 106 Ill.,

189; Sherwood *vs.* Saxton, 63 Mo., 78; Wash. Real Prop., vol. 2, 5th ed., p. 85.)

It is further submitted in the case at bar that a fee-simple was conveyed by these Indians to the appellant to enable the trustee to execute the trust. (Nelson *vs.* Lagow, 12 How., 98; Angel *vs.* Rosenbery, 12 Mich., 266; Stanly *vs.* Colt, 5 Wall., 168.)

The United States became the owner of this property under the terms of this trust, but the *cestui que trust.* has a right to call the trustee to account for the whole proceeds of the land and compel the trustee to hand over, and these rights are subservient to the general purposes of the trust and its provisions in favor of all the objects of the trust. (1 Spencer, Eq. Jur., 497.)

From the nature of the relation of the trustee and *cestui que trust.* of an expressed trust no length of mere possession or occupation by the trustee can operate as a bar to the claim or the rights of the *cestui que trust.* in respect to the estate (Hill, Trusts, 264, and note; Lewin, Trusts, second edition, 613; Perry, Trusts, 3d ed., sec. 863; Wash. Real Prop., fifth ed., vol. 2, p. 535, and note 1 on same page). It is submitted that by the last clause of section 4 of the act of October 1, 1890 (Rec., p. 29), the question of limitation is determined in favor of the appellee (Rec., p. 29, section 3 of the act). There seems to be in this question this distinction: "Where there is no disclaimer the statute of limitations has no application to express trusts" (Perry, Trusts, 3d ed., sec. 864; Seymore *vs.* Freer, 8 Wall., 18). Trusts which can be enforced only in a court of equity where the question is between the trustee and the *cestui que trust.* do not come within the statute of limitations (Governor *vs.* Woodard, 63 Ill., 258). Upon this principle a trust to sell lands upon a prescribed contingency confers a fee-simple upon the trustee to enable him to execute the trust (Willson *vs.* Lagow, 12 How., 98); and in such conveyances a fee is given, though no words of inheritance are used (Wells *vs.* Heath,

10 Gray, 25; Att'y Gen. *vs.* Federal St. Meeting-house, 3 Gray, 48). Upon the question who may make a declaration or create a trust which shall thus attach to an estate, it may be stated, in the first place, that it must be one who has the legal estate in the same (Willis, Trust, 55; Crop *vs.* Norton, 2 Atk., 76). It is here submitted that it cannot be for a moment questioned that the legal title to the land in question and here under consideration at the making of the treaty of August 8, 1831 (7 Stat., 355), with these Shawnee Indians was in these Shawnees. Article 1 of said last treaty refers to the treaty of September 29, 1817 (7 Stats., 160). The said article 6 stipulates and provides—

"That the United States also agree to grant by patent in fee-simple to Catewekesa, or Black Hook; Byaseka, or Wolf; Pomthe, or Walker; Shemenetoo, or Big Snake; Othawakeseka, or Yellow Feather; Chakalowah, or Tails' End; Pemthala, or John Perry; Wabepee, or White Color, chiefs of the Shawnee tribe residing at Wapaghkonetta, and their successors in office, chiefs of the said tribe residing there, for the use of the persons mentioned in the annexed schedule, a tract of land 10 miles square, the center of which shall be the council-house at Wapaghkonetta."

"The United States also agree to grant, by patent in fee-simple, to Peeththa, or Fallingtree, and to Onowaskemo, or The Resolute Man, chiefs of the Shawnee tribes residing on Hogg creek, and their successors in office, chiefs of the said tribe residing there, for the use of the persons mentioned in the annexed schedule, a tract of land containing twenty-five square miles, which is to join the tract granted at Wapaghkonetta and to include the Shawnee settlement on Hogg creek, and to be laid off as nearly as possible in a square form."

Article 5 of this treaty provides that the schedules hereto annexed are to be taken and considered as a part of this treaty, and the tracts herein stipulated to be granted to * * * the Shawnee Indians are to be granted for the use of the persons mentioned in the said schedule.

It will be observed by referring to and reading article 1

of the treaty of August 8, 1831 (7 Stats., 355), of this treaty that these Indians at this time occupied a tract of land on the southern shore of Lake Erie between the mouth of Sandusky bay and the mouth of the Portage river, which is now a part of the county of Lucas and Ottawa, in the northern part of the State of Ohio (7 Stats., 160), and that these Indians moved from this place, by the stipulations and provisions of this treaty of 1817, into Allen, now Auglaize, county, in the State of Ohio, south and west of the former place, taking possession of these lands under the provisions of this treaty and occupying, possessing, and owning these said lands, as described in the treaty of August 8, 1831, from 1817 until 1832; at which time these Indians disposed of these lands in the manner as provided in the several articles of the treaty of August 8, 1831, under the provisions of the act of Congress of May 28, 1830 (4 Stat., 411); they disposed of these lands, and in article 1 of the treaty of 1831 it is recited and referred to that these lands are the lands which were ceded to these Indians by the provisions and stipulations of the articles of the treaty of 1817 (7 Stat., 355), and to recover the amount stipulated and provided for in the sale of these lands in the seventh article of the treaty of August 8, 1831, this action was brought. It is here submitted that the facts above stated and the provisions and stipulations in the several articles of the said two treaties, namely, 1817 and 1831, bring this case, or the part of this case, within the rules heretofore stated in this connection relating to title, trusts, and powers. The rule that no one is obliged to become a trustee by the appointment of another does not seem applicable to the case at bar in the sense that the rule is usually applied to other similar cases, for the reason that the United States, by its Constitution, prohibits any person or corporation or government from any intercourse or trade with tribes of Indians within its limits, except as may be

assented to and provided for by acts of Congress expressly made in such cases and therein directed.

It will not for a moment be denied that the United States is capable of being and acting as trustee for the selling and disposing of real estate and subject to the provisions, directions, and stipulations of the statutes creating the trust, and is liable to its wards for violations and non-fulfillment of obligations incurred in this behalf. In this case this trust is organized, established, and provided under the authority of the act of Congress of May 28, 1830 (4 Stats., 411), and also the several articles of the treaty with these Shawnee Indians of August 8, 1831 (7 Stats., 355). It is here observed that trusts are subdivided into mere dry trusts and special or active trusts (Lewin, Trusts, 2 ed., p. 23). It is of the latter that governs this transaction, and in such cases the trustee is required to exert himself actively in executing the same, and a delegation of power to the third person, except so far as ministerial acts, is never permitted. (Verger *vs.* Duff, 4 Johns Ch., 368; May *vs.* Frazee, 4 Litt., 391.)

And another important distinction is to be observed in the definition of trusts of this nature, that trusts are always imperative and bind the conscience of the trustee and may be enforced accordingly (Stanly *vs.* Colt, 5 Wall., 168). While it is true that the United States, as a corporation, may be void of what is defined as *conscience*, yet this will not justify the United States, acting as the trustee herein, from performing and executing this trust in the *utmost good faith* towards these wards and be held responsible and accountable for a breach of the duty imposed by this treaty, and that courts will enforce such in its jurisdiction in cases authorized to be litigated against the United States. This principle is extended by the courts to the "*extremest*" length in holding agents and those occupying fiduciary relations to the property of infants, married women, or others under a legal disability in relation to their lands (Collens *vs.* Smith, 1 Head, 251). The rule that no one but the *cestui que trust.* or

his heirs can avoid a sale made by a trustee of land would have a limited or no beneficial application in this case, for a forbearance to exercise this right for a long time would be held to be equivalent to a ratification of the sale of this land to the United States citizens by this trustee, the appellant, which is now over sixty years (Painter *vs.* Henderson, 7 Penn. St., 48; Mitchell *vs.* Berry, 1 Met. (Ky.), 602). But it is a sound rule that the statute of limitations will in no case run against one innocently ignorant of his rights or against one incompetent, like an infant, to enforce them (Willison *vs.* Watkins, 3 Pet., 43–54). But in this and similar cases, from the nature of the parties, assent must be granted by the trustee to bring suit before any action of this character can be maintained, which is fully expressed in the acts referring these claims to the courts. Is this such a declaration of a trust as to require the purchasers of this land at this sale to see that the money derived from the sale was applied as directed by the terms of the declaration of the trust?

In discussing this question Washburn, in his second volume on Real Property, fifth edition, page 574, section 20, says:

"There is one class of trusts in which equity follows the estate into the hands of the *bona fide* purchasers, although the sale be made in conformity with the power and duty of the trustee, and that is where devises of lands are made to trustees to sell for the payment of debts certain or specific. The purchasers in such cases are bound to see that the money is properly applied; otherwise the land may be charged in such purchasers' hands with the trust of paying such debts or the execution of such purpose (Story, Eq. Jur., sec. 1127; Dyffy *vs.* Calvert, 6 Gill, 487; Gardner *vs.* Gardner, 3 Mason C. C., 218; Dunch *vs.* Kent, 1 Vern., 260; Spalding *vs.* Shalmer, 1 Ver., 301; 1 Cruise's Dig., 450). This doctrine is confined to cases where the trust is of a limited and defined nature, and does not extend to one of a general character, such as the payment of a testator's debts or legacies generally, without specifying or defining them (Conover *vs.*

Stothoff, 38 N. J. Eq., 55; Keister *vs.* Scott, 61 Md., 507; Guill *vs.* Northern, 67 Ga., 345; Carey *vs.* Brown, 62 Cal., 376; Norman *vs.* Town, 130 Mass., 52). The reason for the distinction is that in one case the purchaser is apprised by the terms of the power of the trustee of the specific purposes for which the money is to be applied and may protect himself by seeing that this is done; in the other he has no means of knowing what debts and the like are to be paid nor to whom. (Story, Eq. Jur., sec. 1130; 1 Cruise's Dig., 451; Potter *vs.* Gardner, 12 Wheat., 498; Andrews *vs.* Sparrowhawk, 13 Pick., 393; Stall *vs.* Cincinnati, 16 Ohio St., 169, 177; Urann *vs.* Coates, 117 Mass., 44). Where the trustee is to sell at *his discretion* at *public* or *private sale* the purchaser is not bound to see to the application of the purchase-money."

It will be observed that in article 7 of the treaty of 1831 there is no discretion provided for in making the sale of this land, but the direction to the trustee is that this land should be sold at *public sale* to the highest bidder.

"And where the trust is recorded the purchaser is charged with notice with what it is, and, if the sale were made for other purposes than the execution of the trust, the courts may in their discretion set it aside if this was known to the purchaser." (Nichols *vs.* Peak, 12 N. J. Eq., 69.)

Will this rule apply where the trust is made by statute? Therefore, from the foregoing, this trust possesses all the elements of a trust in which it is required that the treaty, in view of the public statute in force at the making of the treaty, should be followed in both the letter and the spirit thereof.

In the case at bar, relief is sought under the acts of Congress, referring these claims to the Court of Claims and providing for appeal to this honorable Court (Rec., pp. 15 and 17, inclusive) for compensation in damages, but the rule above will serve to support the allegation in the pleadings asking the Court to consider and grant full and compen-

sative relief in compliance with the provisions of the treaty and statutes and the rule presented.

That the amount of money at 70 cents per acre is in the aggregate $67,236.05, and that the said amount belongs to these Shawnees' tribal fund and does not belong to the United States Government, the appellant; that these Shawnees never received the said one hundred thousand acres of land in the State of Missouri or any part thereof. (Rec., pp. 5 and 27.)

The petitioner further avers that the said sum of $13,000 was and now is due and payable to the Shawnees; that the advance was never made by the United States Government, the appellant, at the said time for the purposes stipulated and provided in the fifth article of the said treaty of 1831 (Rec., p. 6). Again, the petitioner avers that the aforesaid lands were not sold and disposed of by the United States Government, the appellant, as provided in the seventh article of said treaty, nor as provided in acts of Congress, and that he is informed and believes that the United States Government, the appellant, did sell the said lands for the sum of, to wit, $122,633.70 (Rec., p. 18, Exhibit C), and there was deducted from and out of the said amount for the purposes provided (1) the sum of $67,236.05, which amount represents the sum of 70 cents per acre on the whole amount of acres of land so sold and ceded under the provisions and stipulations of articles 1 and 2 of the treaty of 1831.

(2.) The sum of $5,000 for a grist-mill.

(3.) The sum of $2,000 for a saw-mill.

(4.) The sum of $1,000 for a blacksmith shop, in compliance with the provisions and stipulations of article 4 of the treaty of 1831.

(5.) The sum of $13,000 to pay for the abandoned improvements which individual members of the Shawnee tribe of Indians before made and which they left on the land so ceded, as stipulated and provided under the provisions of article 5 of the treaty of 1831 (Rec., p. 10). These several amounts

aggregate $87,236.05. This amount deducted from and out of the $122,633.78 leaves a remainder of $34,397.73. This amount, by the provisions of article 7 of the said treaty of 1831, was to create a fund which was to be retained by the appellant, and the said appellant covenanted and agreed to pay 5 per cent. per annum as an annuity to these Shawnees, to be continued during the pleasure of Congress under the provisions and directions as provided in the said seventh article of the treaty of 1831, and that Congress never passed any act or joint resolution to discontinue the said created fund or annul the payment of the 5 per centum per annum interest on the said created fund as such annuity, and that the chiefs of the Shawnees or the Shawnee people in a general council assembled have never expressed a desire or any request that the said so-created fund should be dissolved or discontinued and paid over to these Shawnees, and that the President of the United States has never directed, ordered, or caused this created fund to be paid to the Shawnees, and that these Shawnees have never received the said sum of $34,397.73 or any part thereof nor the 5 per centum per annum interest on the said sum or any part thereof, and that the said principal sum belongs to the Shawnees' tribal fund and is wrongfully diverted and withheld from the said tribal fund by this appellant, and that the said amounts are justly due and unpaid to these Shawnees. (Rec., p. 6.)

Petitioner again avers that the sum of $67,236.05, which represents the said amount of 70 cents per acre for the said 96,051.48 acres of the said land as described and set forth in articles 1 and 2 of the said treaty of 1831, and which sum is to be retained from and out of the proceeds of the sale of the said lands was never paid over to the said Shawnees or any part thereof, as provided by said seventh article of the said treaty, and that this sum of money belongs to the tribal fund of the said Shawnees, but is wrongfully retained and withheld and wrongfully diverted by the appellant, and that the said sum of $13,000 was never paid over to these

Shawnees, as provided and directed by the fifth article of the treaty of 1831, and that this sum of $13,000 belongs to the Shawnees' tribal fund, and that this money is wrongfully retained and withheld and wrongfully diverted from these Shawnees' tribal fund by the appellant (Rec., p. 7). In the fifth finding of facts of the Court of Claims (Rec., p. 21) the Court say as follows:

"Out of the proceeds of the land sales in Ohio the United States has retained (at 70 cents per acre) the amount shown in findings 6; also $6,994.40, the cost of the grist-mill and saw-mill; also $1,011, the cost of surveying; also $13,000 for improvements."

This finding of these facts supports the allegations in the petition that the appellant did receive the said amount of 70 cents per acre from the sales of this land, which in the aggregate is $67,236.05, and the additional sum of $13,000, which amount has not been paid to these Shawnees, as provided in the said articles 5 and 7 of the treaty of 1831, and no proof is found in the record that appellee received the amount, and that the appellant is liable in this action for the payment of these two amounts, with the addition of 5 per centum per annum on the amounts from the time of the making this treaty by the appellant up to and including the present time. (Fifth and seventh articles of the treaty of 1831.)

Again, referring to article 7 of the treaty of 1831, petitioner avers that the appellant, as the trustee and agent for these Shawnees, stipulated, agreed, obligated, and promised and undertook to sell these lands by exposing the same to public sale to the highest bidder in the manner of selling public lands.

Petitioner avers and states that these lands were taken by the appellant and were *not* by this appellant exposed to public sale to the highest bidder in the manner of selling public lands, except 9,841.27 acres, which amount of land

brought $2.08¾ per acre, amounting to $20,543.99; that 81,665.62 acres were by this appellant *sold at private sale* for the low sum of $1.25 per acre, in direct violation of the stipulations and obligations of the seventh article of the treaty of 1831 and in violation of the trust and confidence reposed and obligated by this appellant in the said article, as more fully appears. (Rec., p. 13, and Exhibit C, Rec., pp. 18 and 26.)

These Shawnees here claim that by the said violations and wrongful acts of the appellant in this part of this transaction they, these Shawnees, have been defrauded and deprived of their rights guaranteed to them, and that they claim to have a right to recover and collect in this action from the appellant the sum of the difference between the amount of $2.08¾ per acre on this amount of land which was so wrongfully sold at private sale and the amount of $1.25 per acre, which is 81,661.62 acres, which difference is 83¾ cents per acre, which in the aggregate makes $68,491.28, and with interest added at 5 per centum per annum on the above amount from the date or time of making and ratifying the said treaty up to and including the time that the said amount shall be paid by the appellant. (Rec., pp. 8, 26.)

Petitioner again avers (Rec., p. 8) that the whole amount of the tract of land ceded under the provisions of the said treaty of 1831 is 96,051.48 acres (Rec., p. 21, sixth finding of the Court of Claims), and that the appellant sold only 91,506.89 acres, as accounted for (Rec., p. 18, Exhibit C); 9,841.27 acres only of this land were sold at public sale, as provided by the seventh article of the treaty of 1831, which brought $2.08¾ per acre (Rec., p. 18, Exhibit C). This left 81,665.62 acres, and is reported sold at private sale at $1.25 per acre. (Rec., p. 21, sixth finding of the Court, and Exhibit C, Rec., p. 18.)

Petitioner again avers that on the 30th day of April, 1802 (2 Stats., 173), an act was passed and approved by the President, entitled "An act to enable the people of the east-

ern division of the territory northwest of the River Ohio to form and constitute a State government," and that section 7 of the said act of Congress provides as follows:

"First. That the section number 16 in every township and where such section has been sold, granted, or disposed of other land equivalent thereto and most contiguous to the same shall be granted to the inhabitants of such township for the use of schools."

Again, on the 3d day of March, 1803 (2 Stats., 225), Congress passed and the President approved "An act in addition to and in modification of the proposition contained in the act" above cited and referred to. The fourth proviso of the first section of the act is as follows:

"One thirty-sixth part of all of the lands of The United States, the appellant, lying in the State of Ohio, to which the Indian title has not been extinguished, which may hereafter be purchased of the Indian tribes by the United States, which thirty-sixth part shall consist of the section number 16 in each township, if the said lands shall be surveyed in townships of six miles square, and shall, if the lands be surveyed in different manner, be designated by lots for the use of schools." (Rec., pp. 9 and 26.)

It will be observed that the dates of the passage of these above acts are April 30, 1802, and March 3, 1803, and that the cession of these Shawnees' lands was on the 8th day of August, 1831. In effect these statutes effected these lands as soon as surveyed, and the lands were surveyed, as is shown by the sixth finding of the Court of Claims, where the Shawnees are charged $1,011. (Rec., p. 21.)

Rec., p. 9, the petitioner avers that the State of Ohio did receive for the purposes provided for in these acts of Congress three thousand acres of this land, and that the said land was worth the sum of $2.08¾ per acre, making an aggregate of $6,262.50, for which sum these Shawnees claim interest at 5 per cent. per annum from the 8th day of August, 1831,

up to and including the time which The United States, the appellant, shall pay to these Shawnees for the said lands.

The petitioner again avers that on the 18th day of May, 1796, Congress passed and the President approved an act (1 Stats., 464) entitled "An act to provide for the sale of the lands of the United States in the territory northwest of the River Ohio and above the mouth of the Kentucky river."

And that section 4 of this act provided as follows (p. 467):

"*Provided always*, That no part of the lands directed by this act to be offered for sale shall be sold for less than $2 per acre."

And that afterwards, on the 10th day of May, 1800, Congress passed and the President approved an act (2 Stats., 73) entitled "An act to amend the act entitled 'An act to provide for the sale of the lands of the United States in the territory northwest of the Ohio and above the mouth of the Kentucky river.'"

That section 5 of this act (p. 75) is as follows:

"*And be it further enacted*, That no lands shall be sold by virtue of this act at either public or private sale for less than $2 per acre, and payment may be made for the same by all purchasers either in specie or in evidence of the public debt of the United States." * * *

And that afterward Congress passed and the President approved the following act on the 14th day of July, 1832 (4 Stats., 601), entitled "An act to authorize the sale of public lands in the State of Ohio," and which is as follows:

"*Be it enacted, &c.*, That the lands heretofore reserved for certain Indian tribes in the State of Ohio and which were ceded to the United States by treaties ratified on the 24th day of March, in the year 1831, and on the 6th day of April, 1832, be, and the same are hereby, attached to and made to form a part of the land districts in which they are respectively situated and liable to be sold as other public lands in the State of Ohio." (Rec., pp. 10 and 11.)

That the said Shawnee treaty of August 8, 1831, was ratified on the 6th day of April, 1832, by the United States in compliance with the Constitution of the United States and the acts of Congress in such cases made and provided, and that the said land mentioned in the said act was the land which these Shawnees did cede and convey to The United States, the appellant, in the articles 1 and 2 of the treaty of 1831, and that this land was and is situated in one of the land districts heretofore created by the acts of Congress in the said State of Ohio, and that the action of the officers of The United States, the appellant, in selling a portion of the said lands at private sales in the said State of Ohio for the price of $1.20 per acre was and is a direct violation of the said acts of Congress aforesaid and of the seventh article of the treaty with these Shawnees of 1831, and that the difference between $2 per acre and $1.25 per acre, which is 75 cents per acre, on 81,666 acres makes an aggregate of $61,249.50, for which the said Shawnees here claim in addition to the amount as shown to have been received by The United States, the appellant (Rec., p. 30, Exhibit C), and interest on the said amount at 5 per cent. per annum from the said 8th day of August, 1831, up to and including the time which the appellant may or shall pay to the said Shawnees the said sum of money. (Rec., pp. 11 and 26.)

The Court will see that this item is the same item as is claimed under the allegation made in the Record, p. 7. The difference is between $1.25 per acre, the amount reported for which the land sold at private sale, and $2.08¾ per acre, the amount the land sold for at public sale, amounting to $68,491.28. This is just under the contract made in article 7 of the treaty of 1831, and that $2.08¾ per acre for this land is the just and fair price fixed by the appellant in the showing presented in Exhibit C (Rec., pp. 18 and 26); and, as this price, $2.08¾ per acre, includes the improvements left on these Ohio lands under the provisions of articles 5 and 7 of the treaty of 1831, it must be considered by this Court

that $2.08¾ per acre was and is a minimum price fixed for the sale of these lands.

The statutes of the United States passed and approved May 10, 1800 (2 Stat., 73), before referred to, fixed the price of public lands at not less than $2 per acre. The treaty of 1831 fixed the sale of these lands at the highest price which they should bring at public auction.

The portion of these lands which were sold at public auction brought $2.08¾ per acre.

The Court of Claims should have been governed by the treaty, for there could be no just rule to drop back on the law which fixed a price for the sale of public lands generally. The treaty is the rule governing the price of these lands. When sold at public auction they brought $2.08¾ per acre, and it is reasonable to believe that the rest of these lands when exposed to sale at public auction would have brought as much as that, and they would doubtless have brought more, for as the country developed public lands became more valuable and desirable. At all events the Court should have been governed by the price which these lands brought at public sales.

It will appear that the honorable Court of Claims has taken the evidence from the provisions of these acts, these acts directing that this sale should be made at the price of $2 per acre instead of $2.08¾ per acre in the manner as provided for by the seventh article of this treaty of 1831. This counsel for the appellee challenges the correctness of and authority of the Court of Claims to decree, and insists that the amount fixed is as by the returns made by the appellant of the sales of this land in the first item in Exhibit C (Rec., p. 18), where the land was sold at public sale for the sum of two dollars and eight and three-fourths cents ($2.08¾) per acre, and that the aggregate amount due for this violation of the trust created by the seventh article of the treaty of 1831 is $68,491.28 and not $61,294.50.

In the sixth finding of facts, as appears in the Record, p. 21, the following appears on this item:

"Of these acres there were sold at two dollars and eight and three-fourths cents ($2.08¾) per acre 9,841.27 acres, yielding $20,543.65. There remained (acres) 84,604.78, which, at $2 per acre, would have yielded $169,209.56. Adding this to the $20,543.65 gives a total of $189,753.21."

It is here submitted by counsel for the appellee that the 84,604.78 acres, instead of yielding $2 per acre, the court should have found that this said amount of land yielded $2.08¾ per acre, which is in the aggregate $176,701.49 instead of $169,209.56, and adding $20,543.65 to the said $176,701.49 aggregates $197,245.14 instead of $189,753.21, making a difference in favor of these Shawnees and against this appellant of $7,491.93, as is found and appears in this record above quoted in relation to this item of claim. Therefore counsel here contends that all of this land so sold under the trust created under the provisions of the seventh article of this treaty of 1831 should be rated and decreed as yielding $2.08¾ per acre instead of $2 per acre, as the honorable Court of Claims has decreed. (Rec., p. 26.)

The petitioner again avers that prior to the 10th day of May, 1854, these Shawnees owned, possessed, and occupied a tract of land west of the State of Missouri, which was ceded to them by the second and third articles of the treaty of November, 1825, and the second article of the treaty of August, 1831 (Rec., p. 11); that on the 10th day of May, 1854, these Shawnees made a treaty with the United States (10 Stats., 1053), whereby they ceded to The United States, the appellant, two hundred thousand acres of this land for the sum of $829,000, $40,000 of this amount to be set aside for special purposes, and interest to be paid thereon at the rate of 5 per cent. per annum; that all of the said payments were made to these Shawnees except the sum of $22,000, which was wrongfully retained by the appellant

out of the last payment of money stipulated to be paid under the provisions of the third article of this treaty of 1854.

That in 1884 Congress passed an act (23 Stats., 247,) making appropriations to supply the deficiency of this sum of money taken from this fund by the appellant, to wit, the sum of $10,000, but that the remaining amount due to these Shawnees under the provisions of this treaty has never been appropriated, and that neither of the said sums have been paid nor the interest thereon to these Shawnees or to the Shawnee orphans. (Rec., pp. 12, 28.)

The prayer of the petitioner sets up that these claims under the provisions of these treaties of 1825, 1831, and 1854, with interest at 5 per cent. per annum, are all due and unpaid to these Shawnees, praying decree and judgment of the court for the said several amounts (Rec., pp. 12, 13, 14, 15,), and the closing paragraph of the prayer of the petitioner is as follows, to which the Court's attention is here directed:

"In consideration whereof, and inasmuch as the claims made and the wrongs complained of are remediless in the premises under the rule of the common law and are only relievable in a court authorized by acts of Congress and are cognizable only in this form and procedure, this petitioner further prays that The United States Government, the defendant herein, be required to answer separately and singly the allegations herein made and the claims alleged, but not under oath, the oath being expressly waived, and that the said defendant's answer shall truly and fully set out and exhibit a full and true statement of all the claims and demands herein set forth in this petitioner's petition for the said Shawnee Indians; and your petitioner will ever pray."

The only answer the defendant, the appellant here, ever filed in answer to this part of the prayer of this petition will be found under the I reference in this record, and is as follows:

"The defendant filed a traverse of said petition July 3, 1891."

The case was tried in the Court of Claims and the decree made and judgment entered, as shown in this record.

We submit to this Court that the defendant, the appellant here, under the presentation of this record and under the provisions of the act of Congress referring these claims to the Court of Claims, and appeal to this Court, is not in condition to reply to any of the allegations by objections in brief and argument in this case, or rebut any of the statements made by the petitioner in the allegations in this petition in any manner in this Court, but that the same is taken as confessed by the appellant, as shown in the findings of the Court of Claims and the decree and judgment of the said Court, and that the appellee is at liberty, in consequence of such neglect and failure of the appellant, to ask this Court to review the whole case and to suggest to this Court such errors in the findings of the Court of Claims and the judgment as appear from the whole record, taking into consideration that all the allegations in the pleadings are proven to the satisfaction of the Court of Claims and that the appellant makes no objections to the record as appears. It will be seen by the provisions of section 2 of the act of Congress referring these claims to the Court of Claims and appeal to this Court that the following is provided:

"That the said Shawnees * * * shall have a right, either separately or jointly, to begin and prosecute a suit * * * against the United States Government to recover from the United States all money due either in law or equity." (Rec., p. 16.)

Again, section 4 of the said act provides as follows:

"That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government in the Court of Claims to recover and collect from the United States Government

any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right of appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections 1, 2, and 3 of this act." (Rec., p. 17.)

Afterwards, as will appear from the supplemental and amendatory portion of this act, the following provision appears:

* * * "That the said Shawnee tribe or band of Indians whose claims and demands against the * * * United States were referred to the United States Court of Claims for adjudication under the act of Congress * * * approved October 1, 1890, shall present to the Court all their claims against the United States * * * of every description whatever arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties made and entered into by and with the said Shawnees * * * and the United States." (27 Stats., 86.)

Counsel for the appellee submits to this Court that these provisions of these acts of Congress give to the Court of Claims in the case at bar full equity power in the proceedings in the case, and that the Court of Claims has so considered the construction of these acts in every part of the proceedings in this case, except the rule of requiring the defendant, the appellant here, to answer, as required by the closing paragraph of petitioner's prayer in this petition, and that the plain rules governing such default should be enforced against this appellant in this case, as here shown and now contended for.

Returning and referring to the item of $13,000 claimed to be due these Shawnees, as appears in the averments of the petitioner (Rec., pp. 5, 6, 7), the Court of Claims, in its finding of facts, neglects and refuses to allow this item of claim as alleged and averred to be credited and paid to these

Shawnees, but charges it to these Shawnees as so much money received from the appellant. (Rec., p. 21, VI finding of facts.)

The Court of Claims, in its opinion, has the following to say on this item:

"The next article, 5, provides, in lieu of the improvements which have been made on the lands herein ceded, it is agreed that the United States shall advance to the said Shawnees (for the purpose of enabling them to erect houses and open farms at their intended residence) the sum of $13,000, to be reimbursed from the sale of the lands herein ceded by them to the United States. A fair and equitable distribution of this sum shall be made by the chiefs of the said Shawnees, with the consent of the people in general council assembled, to such individuals of their tribes who have made improvements on their lands herein ceded and may be properly entitled to the same."

The Court says:

"As to this it is contended for the plaintiff that the transaction agreed upon resulted in no advantage to the Shawnees, because if the $13,000 be understood to be an advance merely, to be afterwards reimbursed from the sale of the Ohio lands, the United States would receive the improvements and also ultimately the $13,000 at which they are valued. It is not alleged that the $13,000 has not been paid."

Counsel for the appellee here begs to present to this Court first the averment, reference 5 of the record:

"This petitioner avers that the said sum of $13,000 was and is now due and payable to the Shawnee tribe, and that the advance was never made by the United States Government at the said time to pay individual Shawnee Indians for improvements who had before made such on the said ceded lands and which were left on the land at the time that the said Shawnee Indians moved off the lands, as provided in said treaty, and that the deduction that was provided for, to be made out of the proceeds of the sale of said

lands, was intended to be and is a part of the Shawnee Indian tribal fund." (Rec., p. 6.)

Again:

"Petitioner states that the said sum of $13,000 which is expressly provided and stipulated to be paid to the Shawnee Indian * * * belongs to the said tribal fund, and that the said sum of money is wrongfully retained and withheld and wrongfully diverted from their tribal fund by the United States Government, and that the said amount is justly due and unpaid to the Shawnee Indians."

These allegations should rebut this assertion in this opinion and record where the Court says: "It is not alleged that the $13,000 has not been paid" (Rec., p. 25). Counsel further submits that article 7 of this treaty of 1831 provides—

"That the United States will expose to public sale to the highest bidder, in the manner of selling public lands, the tracts of land herein ceded by the said Shawnees, and after deducting from the proceeds of such sale the sum of 70 cents per acre, exclusive of the cost of survey, the cost of the grist-mill, saw-mill, and blacksmith shop, and the aforesaid sum of $13,000, be advanced in lieu of improvements." (Rec., p. 25.)

The Court of Claims opinion is as follows:

"We construe the treaty of 1831 to mean that the Shawnees surrendered absolutely to the United States their lands in Ohio In return for this cession they were to receive land west of the Mississippi, the expenses of removal, an advance to pay for the saw-mill and grist-mill provided by article 4, the price of their lands in Ohio when these lands were sold at public sale to the highest bidder in the manner of selling the public lands, and advance of $13,000, the amount which article 5 directed should be advanced to the Indians 'for the purpose of enabling them to erect houses and open farms at their intended residence,' and which sum was also directed in the same article should be 'reimbursed from the sale of the lands' conveyed by them."

Again, the Court says:

"The United States failed in their duty when they sold any of these lands otherwise than at public sale to the highest bidder in the manner of selling public lands, and as trustees of these Indians and their guardians are liable to them for any loss which the Shawnees may have thus sustained."

This sum of $13,000 was provided to be paid for the improvements left on the lands in Ohio. It certainly was never intended that the Indians should lose these improvements; yet they would lose them if this sum is to be deducted from the amount for which the lands were sold, for this would be taking the Indians' money to pay for their own improvements.

Again, the $13,000 was in any event only to be deducted from the proceeds of the sale of the lands when *sold at public auction to the highest bidder;* and counsel for the appellee respectfully submits that this Court, as an act of simple justice and right, must allow to these Shawnees this claim of $13,000, with interest at the rate of 5 per cent. per annum from the date of making the treaty of 1831 up to and including the present time, and that this sum of $13,000 which is charged to these Shawnee Indians will be cancelled and taken out of the statement as a debit against these claimants in the account.

The next claim presented in this record is the claim made under the treaty of 1854 (10 Stats., 1053). In the VIII finding of facts (Rec., p. 22) the Court finds that—

"Owing to the laches or dishonesty, certain money due to orphan children under the treaty of 1854 with the Shawnees, to be distributed under the last clause of article 8 thereof, was lost to them. The President deemed best to pay their money over in severalty. The Shawnee council created certain so-called guardians of the orphan children, and to them the defendant paid a portion of the orphans' money, which by laches or dishonesty never reached the orphans. Another portion of the orphans' money was com-

1895, 41 years, makes $19,347.08. This added to the principal makes a total of $28,784.70, the amount claimed by the provisions of this treaty of 1854.

Time when Treaties Take Effect.

The next topic presented for the consideration of this Court is the time when treaties take effect and when interest at 5 per cent. should begin. It is a rule of law recognized by this Court that "as between the contracting powers the date of execution and subsequent ratification has relation to this, and binds the contracting parties from the moment of its conclusion, and that is the day it is signed." The doctrine of relation has always been applied by this Court in such cases. (United States *vs.* Arredondo, 6 Pet., 691, 758 (1832); United States *vs.* Reynes, 9 How., 127, 148 (1850); Davis *vs.* Police Jury of Concordia, *id.*, 280, 289 (1850); United States *vs.* D'Auterive, 10 *id.*, 609, 623 (1850); Montault *vs.* United States, 12 *id.*, 47, 51 (1851).) It is here presented and claimed that the time when interest on these several amounts here claimed by appellee should be computed and allowed on these claims, the date and time should be at the *making* and *signing* of the said several treaties and not as found by the Court of Claims and presented by the findings of fact in the Record, p. 36, VI finding.

In this Record, p. 29, the Court of Claims present the following:

"In calculating interest we have not followed the strict rule of the common law in relation to promissory notes, as, in our opinion, the result would be inequitable to defendants." Are not the equities of petitioner quite equal to the equities of the Government?

It is provided by the seventh article of the treaty of 1831 that * * * "the United States agree to pay to the chiefs

for the use and general benefit of their people annually 5 per centum on the amount of said balance as an annuity." * * *

The claims under the provisions of this treaty and this section do not need the aid of the common-law rule in computing interest on the amounts, for the plain reason the contracting parties, the appellant, agreed, obligated, and promised to pay 5 per cent. *annually* to these Shawnees on the several claims, which time is August 8, 1831. Section 3659, Revised Statutes United States, requires the investment by this appellant, annual interest accruing at a rate of interest not less than 5 per cent. per annum. In equity this or these amounts, under the provisions of the treaty of 1831, may be regarded as invested, principal and interest, at this rate of interest at the date of the treaty.

The third article of the treaty of 1854 on this part of the obligation provides as follows:

* * * "Forty thousand dollars to be invested by the United States at a rate of interest not less than 5 per centum per annum."

This fixes the rate of interest in this treaty, and, if the contract between these litigants is to be observed as made, the time for the computation of the interest on the claims allowed under the provision of this treaty will begin at the time of making and signing the treaty, which is May 10, 1854. (10 Stats., 1053; 21 Stats., 70 Rev. Stats. U. S., sec. 3659.)

In the treaty of 1831 it is provided by article 7 that 70 cents per acre, $66,252.23, on the Ohio lands should be retained by the Government, the appellant. After some years of dallying and delay the Government, this appellant, acknowledged its inability to furnish the 100,000 acres agreed upon. It, therefore, in lieu of the said 100,000 acres, appro-

priated $66,246.23, which is $6 less than the 70 cents per acre deducted on the Ohio lands on this item. The date of this appropriation is May 3, 1853. It will be remembered that this treaty was made August 8, 1831. Twenty-one years therefore elapsed from the making of the treaty during which these Indians were without land or the money equal thereto. Justice and equity demands that they should have 5 per cent. interest per annum on the said amount of $66,252.23 for this period. This interest equals $69,564.81, and this last-named amount, as between a guardian and ward, would be allowed by the orphans' courts of the land and ought to be allowed by the courts of the United States. This payment should and can not be held to be a payment of the 70 cents per acre deducted by and retained by the appellant, as provided by the seventh article of the treaty of 1831, from the proceeds of the sale of these Indian Ohio lands, but as a compensation for the failure of the United States to fulfill treaty obligations created in 1831 to grant by patent in fee-simple a tract of land equal to fifty miles square, as provided by article 2 of said treaty.

The appropriation statute adopts this view when it says (10 Stats., 236)—

"For payment in full of all claims under that part of the treaty of 1831 which has relation to the grant of 100,000 acres of land to the then Ohio Shawnees, $62,246.23."

And the statute required that receipt for this money should specify that "it is in full satisfaction of such claim," meaning the claim to this land, under the provisions of article 2 of this treaty, and such receipts were given. (Rec., p. 27.)

The wording of article 7 is as follows:

"The United States will expose to public sale to the highest bidder, in the manner of selling the public lands, the tracts of land herein ceded by the said Shawnees.

"And after deducting from the proceeds of such sales the

sum of 70 cents per acre, exclusive of the cost of surveying, the cost of the grist-mill, saw-mill, and the blacksmith shop, and the aforesaid sum of $13,000 to be advanced in lieu of improvements, it is agreed that any balance which may remain of the avails of the land after sale as aforesaid shall constitute a fund for the future necessities of said tribe." * * *

Counsel submits that this payment to these Shawnees—this amount of $66,246.23, as provided by this appropriating act of May 3, 1853—cannot be construed by the Court as touching or having anything to do with the part of the transaction providing for the retention and deduction of the 70 cents per acre as provided in article 7 of this treaty, as the transactions are provided for in separate and distinct articles of the treaty, and the deductions enumerated in article 7 of the treaty repeat the provisions of articles 3, defraying the expenses of moving these Indians; 4, grist-mill, saw-mill, and blacksmith shop, and article 5, for the reimbursement of the $13,000 advanced for the improvements left by these Shawnees on these Ohio lands. Nothing is said in this enumeration in article 7 about any of the provisions or stipulations contained in article 2 of this treaty, which article is the cession and consideration part of this treaty, transferring these lands, and stipulating for the transfer of this amount of land west to these Shawnees in exchange for their Ohio lands. No price is fixed by any of these articles of this treaty for the lands west which these Shawnees were to have under the provisions of article 2 of this treaty. It is evident that this provision in article 7 of the treaty to deduct and retain this 70 cents per acre from the proceeds of the sale of this Ohio land, when sale in conformity with the provision of this article 7 was an item placed in the column with the other deductions and retainers therein provided, was for the purpose of reaching a basis for the purpose of providing "a fund for the future necessities of the said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of

ments which these Shawnees were compelled to leave and abandon on the Ohio lands, because the Shawnees did not receive the said amount, and which they would have received if the land had been sold at public sale to the highest bidder, as provided by the stipulation of article 7 of the treaty of 1831. No exception is taken to the two next items of the amount stated under the provisions of the fourth and seventh articles of the treaty, providing for the payment of the grist-mill, saw-mill, and blacksmith shop, and cost of surveying, as the Shawnees received all these improvements on their land West, and the surveying was done for the Shawnees by the United States under the provisions of this fourth article of this treaty, but exception and objection is made to the next item following, charging these Shawnees with the amount of $66,252.23, which purports to be the amount of 70 cents per acre deducted and retained by the United States out of the proceeds of the sale of this Ohio land under the provision of article 7 of the treaty of 1831. The plain construction of this part of article 7 of this treaty enumerating these several amounts to be deducted and retained out of the proceeds of the sale of this land must be that the United States must sell this land at public sale to the highest bidder, and that these amounts were to be placed in a column, and then the deduction made from the gross amount of the sales of this land, the remainder to be and constitute a fund for the future necessities of this tribe of Shawnees, and the United States obligated to pay annually to these Shawnees 5 per cent. per annum. The United States has failed to fulfill all of the obligations in this respect, and in consequence is liable to pay to these Indians this amount of $13,000 and this 70 cents per acre on 94,446.05 acres, which is $66,112.55 on these two amounts added, and which makes the sum of $79,112.55. Simple interest at 5 per cent. per annum should be computed from the time of making this treaty, August 8, 1831, up to and including August 8, 1895, 64 years, which should be added to the principal amount,

and this total should be added to the amount $110.401.08, which is the amount found to be the fund created for the future necessities of these Shawnees after deducting the items enumerated in article 7 from the gross amount which this 94,446.05 acres of land yielded at $2.08¾ per acre, which is $197,518.63; deducting from this sum $87,117.55, which last amount is the aggregate of the items (*a*) $13,000, (*b*) $6,994, (*c*) $1,011, (*d*) $66,112.55, as per articles 4, 5, and 7 of the treaty of 1831; deducting this aggregate from the sum of $197,518.63 leaves $110,401.08, and on this amount interest at the rate of 5 per cent. per annum should be computed, with annual rests from the 8th day of August, 1831, up to and including August 8, 1895, sixty-four years, which will give an aggregate of $2,340,879.26; to this sum should be added $173,993.39, which is made up from the following items: (*e*) $66,112.55, and (*f*) $13,000, making an aggregate of $79,112.55; 5 per cent. per annum for sixty-four years added to this makes $173,993.39; add to this $69,564.81, which is the interest on $66,252.23 at per cent. for twenty-one years, and to this add the claim made on the treaty of 1825, which is $5,072.98; to this add claim under the treaty of 1854, which is $28,784.70. These several amounts added make a grand total of $2,548,730.33, which appears the amount due these Shawnees in this action.

Following appears a tabulated statement of this account as claimed in the above presentation:

The United States in Account with the Shawnee Tribe of Indians under the Provisions of the Treaties of 1825, 1831, and 1854.

Amount deducted and retained by appellant per fifth article of treaty of 1831	$13,000 00	
Per fourth article of treaty of 1831	6,994 00	
Per seventh article of treaty of 1831, surveying	1,011 00	
Amount retained from sales, 70 cents per acre	66,112 55	
Total	$87,117 55	
Deduct this above amount from the whole amount realized from the sale of these Ohio lands (acres, 94,446.05), at $2.08½ per acre	.....	$197,518 63
Amount brought down	.....	87,117 55
		$110,401 08
This is the balance found to create the fund for the future necessities of these Shawnees, on which the Government promised to pay 5 per cent. per annum annually, and on this amount 5 per cent. per annum, with annual rests from August 8, 1831, to August 8, 1895, is computed and added to this amount, 64 years, which aggregates	.....	$2,340,879 26
Amount brought forward		$2,340,879 26
Add to this last amount the following:		
Per article of treaty 7 of 1831, 70 cents per acre for 94,446.05 acres	$66,112 55	
Per fifth article of treaty 1831	13,000 00	
Total	$79,112 55	
Simple interest at 5 per cent. per annum for 64 years on this amount and the amount added to the interest makes	.....	$173,993 39
To this amount add	$69,564 81	
Which is the interest on $66,252.23 for twenty-one years at 5 per cent. per annum in settlement for the 100,000 acres of land granted West.		
Add to this amount the claim made by the treaty of 1825, which is	5,072 98	
Then add the claim made by the treaty of 1854, which is	28,784 70	
Grand total	$2,548,730 33	

Compound Interest—Guardian and Ward—Negligence of Guardian—Claims under Treaties 1825, 1831, and 1854.

If the guardian neglects the interest of the ward, the Court will charge him with simple interest, and in case of gross delinquency compound interest upon annual rests. It must be held that the violations of trusts by the appellants expressed in the treaties of 1831 and 1854 are *gross*, and that this rule is applicable in this case (Rec., pp. 37 to 44, inclusive); and in the English equity system this rule applies to trustees of every kind (The King *vs.* Villers, 11 Price's Rep., 575; Green *vs.* Winter, 1 Johns. Ch. Rep., 26; Denscomb *vs.* Denscomb, *ibid.*, 508; Shieffelin *vs.* Stewart, *ibid.*, 620; Holdridge *vs.* Gillispie, 2 Johns. Ch. Rep., 30; Davoue *vs.* Fanning, *ibid.*, 252; Smith *vs.* Smith, 4 Johns. Ch. Rep., 281; Evertson *vs.* Tappan, 5 Johns. Ch. Rep., 497; Clarkson *vs.* De Peyster, 1 Hopkins' Rep., 424; Rogers *vs.* Rogers, *ibid.*, 515); and these doctrines seem to pervade the United States jurisprudence (2 N. H. Rep., 218; 1 Mason's Rep., 345; 5 Conn. Rep., 475; 1 Peters' Rep., 364; Karr *vs.* Karr, 6 Dana's Kentucky R., 3). In this last case compound interest by means of periodical rests biennially was allowed, as the guardian had suffered interests to lie idle. A *guardian* settled his account with an infant within a month after he became of age and when the latter had no friend or adviser on his part. Account was ordered to be opened, notwithstanding the vouchers had been delivered up. (Revett *vs.* Harvey, 1 Simons and Stuart, 502.)

The practice as to allowing interest, and in strong cases compound interest, against trustees is fully discussed in Wright *vs.* Wright, 2 McCord's S. C. Ch. Rep., 185. In New Jersey, guardians who omit to put the ward's money at interest by reason of fault or negligence are chargeable with 10 per cent. interest (Rev. Laws, 779, sec. 11). This doctrine as laid down in the books that in cases of gross delin-

quency as to trust moneys an executor or other trustee will be charged with compound interest, though just and reasonable in the cases in which it has been applied, has in some instances been rather unsparingly condemned.

We will for a moment examine its foundations. In Rachael *vs.* Boehr, 11 Vesey, 92, 13 *ibid.*, 407–590, it was applied to a case where the executor was directed from time to time to convert the interest into principal, and he disregarded the direction to accumulate. In Schieffelin *vs.* Stewart, 1 Johns. Ch. Rep., 620, the administrator did much worse. He employed the trust money in trade for his own benefit, and refused to give an account of the profits. In the first case the doctrine received the sanction of Lord Rosslyn, Lord Eldon, and Lord Erskine, before all of whom the cause was successively brought. The same doctrine was afterwards recognized by Lord Eldon in *Ex parte* Baker, 18 Vesey, 246, and enforced by the House of Lords, on appeal, in the opinion delivered by Lord Redesdale in Stackpoole *vs.* Stackpoole, 4 Dow's P. C., 209.

The only case in the English courts in which the doctrine has been directly questioned and condemned is that of Tebbs *vs.* Carpenter, 1 Madd. Ch. Rep., 162. The vice-chancellor in that case only refused to apply it to the fact of negligence in the executor, and he admitted that a distinction ought to be taken between negligence and misfeasance or corruption. In this country I may only allude to the case already mentioned in the New York chancery, and I would then observe that the rule was very well discussed so late as 1827 in South Carolina by Judge Nott in giving the opinion of the court of appeals in Wright *vs.* Wright, 2 McCord's Ch. Rep., 185.

He there admitted and Chancellor Dessaussure declared that the general rule in South Carolina was against allowing rests and compound interest against trustees. He said, however, that some cases would require it, though it might be difficult to draw with precision a line of distinction between those cases in which the rule should and should not

apply. He approved of its application as just and proper in the two cases of Raphael *vs.* Boehr and Schieffelin *vs.* Stewart, and he thought that the cases in which compound interest was to be charged against trustees for abuse of trust were rather exceptions to the general rule than parts of one. So in Ringold *vs.* Ringold, 1 Harr. & Gill, 11, and Diffenderffer *vs.* Winder, 3 *ibid.*, 311 S. C., Raymond's Digested Chancery Cases, 363; compound interest was allowed in the court of appeals in Maryland where a trustee speculated with the trust funds and endeavored to stiffe inquiry, and in another case where he was directed to invest funds and receive dividends and accumulate the fund and when he had disregarded his duty and applied the funds to his own use. It has also received the sanction of the court of appeals in Kentucky, of the supreme court of Massachusetts, and of the supreme court of North Carolina, sitting in equity, as proper in certain cases (Fay *vs.* House, 1 Pick. Rep., 527; Hughes *vs.* Smith, 2 Dana's K. Rep., 253; Hodge *vs.* Hawkins, 2 Div. & Batt., 566; Karr *vs.* Karr, 6 Dana's K. Rep., 3.) This doctrine has recently received the powerful sanction of the supreme court of Pennsylvania in the opinion delivered by the chief justice in the case of Harland's Accounts, 5 Rawle's Rep., p. 630, note, and it is repectfully submitted that the rule should be fully applied in this case.

Analysis of Annuity Fund.

Counsel calls Court's attention to the provision of article 7 of the treaty of 1831 with these Shawnees, creating and establishing the fund and the agreement to pay 5 per cent. annually on this fund or the remainder, after making the required deductions, which was to be held as an annuity fund for the future necessities of these Shawnees who are parties to this compact, and that this annuity fund was to be continued during the pleasure of Congress, unless the

gate these cases (which is now over ten years in this case), and the amount of services and labor, skill and money expended, this allowance of 10 per cent. is a minimum compensation for the labor and services and skill in the case at bar.

Counsel for the appellee in closing this brief in this case refers this honorable Court to the following:

"The relations between the United States and the Indian tribes, being those of a superior toward an inferior who is under its care and control, its acts touching them in the execution of its own policy and the furtherance of its own interests are to be interpreted as justice and reason demand in cases where power is exerted over those to whom they owe care and protection." (U. S. *vs.* Kagman, 118 U. S., 375, cited and applied; United States *vs.* Choctaw Nation, U. S. R., 119, p. 1.)

Counsel respectfully submits that the rights and equities of this appellee and these Shawnee claimants demand the increase of the judgment above that given by the lower Court, and that the true sum, as hereinbefore expressed, be decreed to them.

CHARLES BROWNELL,
Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. ~~18,~~ 622

JOHNSON BLACKFEATHER, PRINCIPAL CHIEF OF THE SHAWNEE INDIANS,

vs.

THE UNITED STATES.

Appellee's Motion to Reform and Amend the Order and Mandate of this Court.

Comes now the appellee in the above-entitled cause, by Charles Brownell, his attorney herein, and moves the Court to reform and amend its mandate and order "remanding this cause to the Court of Claims with directions to recompute the amount due to the Indians, etc., in conformity with the opinion of this Court;" by also directing the Court of Claims to consider and grant an application of the appellee to try the said case *de novo*, if in the mind of said Court of Claims an accurate computation of the amount due the Shawnees under the judgment and opinion of this Court cannot be made without such trial.

CHARLES BROWNELL,
Appellee's Attorney.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 1895.

No. 622.

On Appeal from the Court of Claims, October Term, 1894.

THE UNITED STATES
vs.
JOHNSON BLACKFEATHER, Prin. Chief, etc.

Appellee's Brief in Support of His Motion to Reform and Amend the Order and Mandate Remanding this Case to the Court of Claims to Recompute the Amount of Interest Due the Shawnees.

Under the last clause of the second proposition of the Court's opinion and judgment it is stated that—

"It results from this that from the total of $189,753.21, given as the yield of this tract, there must be deducted seventy-five cents per acre upon 84,604.78 acres, or $63,453.58, leaving $126,299.63; subtracting from this the amount paid to the Shawnees as found in the sixth finding, $87,257.63, leaves $39,042 as the balance due in 1840," and allows interest at 5 % in the 3d proposition considered by the court.

It is submitted that the Supreme Court bases its judgment upon the findings of the Court of Claims, and it is not clear from this whether the Court of Claims is to take the $39,042.00 and calculate the interest thereon at 5 per cent. from 1840 or from the date of the treaty, 1831, or whether the Supreme Court, in its opinion directing the Court of Claims to "recompute the amount" due the Shawnees, intends the Court of Claims to recast the accounts from the beginning.

And it is believed that, to reach an accurate conclusion, the Court of Claims must consider portions of the original record, and practically try the case on the facts *de novo*.

Again, in the matter of the so-called orphan fund, $10,506.39.

There never was any question about the Government owing this sum, *either* to the persons to whom it should have been paid originally *or* to the Shawnees in their tribal capacity. The question submitted was, *to whom* shall the Government pay this money?

The judgment and opinion of the Supreme Court rather obscures than settles this part of the controversy.

The opinion and judgment of the Supreme Court is sufficiently clear, however, to enable the Court of Claims to recompute the amount due the Shawnees to *individuals* as well as to the *tribe*, if it can be understood that said Court of Claims has authority to recast the entire accounts from beginning to end under the opinion of the Supreme Court, such as appellee's motion, if allowed, will permit.

Counsel desires to say, also, that upon bringing the opinion and judgment of the Supreme Court to the attention of the Court of Claims, by motion for judgment on the mandate and order of the Supreme Court, the said Court of Claims, finding itself in the dilemma before suggested, asked that the parties, through their respective counsel, get together and agree upon the true computation to be made under the opinion and judgment of the Supreme Court, which we find ourselves unable to do, and have withdrawn our motion for judgment thereon so that greater latitude may be asked for the Court of Claims.

It is therefore believed that the interests of all parties to this action will be subserved by granting to the Court of Claims the latitude embraced in appellee's motion herein.

Respectfully submitted.

CHARLES BROWNELL,
Attorney for Appellee.

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
JOHNSON BLACKFEATHER, PRINCIPAL CHIEF, ETC., APPELLEE. } No. 622.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AMEND ORDER AND MANDATE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
JOHNSON BLACKFEATHER, PRINCIPAL CHIEF, ETC., APPELLEE. } No. 622.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AMEND ORDER AND MANDATE.

The exact scope of appellee's motion is not very apparent. It is called a motion to amend the mandate, but his argument is addressed also in part to the correction of alleged errors in the decision rendered by this court, and also seems to be a request to this court to authorize the Court of Claims to set aside its judgment and grant a new trial, on the questions wherein it decided adversely to the appellee, from which decision appellee saw fit not to appeal.

It is sufficient to say that the power of the Court of Claims to "consider and grant an application of the appellee to try the said case *de novo*" is limited by statute to the term at which its judgment was rendered, which has long since expired.

Again, it seems that appellee is late in his application. On his own motion this court some months ago issued its mandate and sent the same to the Court of Claims, whereby, presumably, the suit ceased to be pending in the Supreme Court.

Notwithstanding these obstacles to any relief of the character sought by the appellee, we beg to urge that there is no ambiguity whatever in the order entered by this court, or the mandate issued. The method of computation is perfectly plain, being exactly that which the Court of Claims adopted in its original judgment, except that a certain portion of the principal is eliminated, and except that the sum of $10,506.39 awarded by the Court of Claims is also directed to be disallowed.

The statement of counsel that the Court of Claims has found itself in a dilemma is entirely unwarranted. The question of the method of computation has never been taken up for consideration by that court further than to say orally to counsel that there ought to be no trouble in making the computation, and they preferred that counsel should attempt to make it out of court and agree upon it. A computation was promptly tendered by the counsel for the Government in exact accord with the clear language of the mandate, but it was then found that the appellee's attorney sought now to add a certain sum of $66,000 with interest from 1831, which in the original judgment was disallowed by the Court of Claims; and also that he sought to add to his computation the sum of $10,506.39, which this court had ordered should be disallowed. These and the apparent dissatisfaction of counsel for appellee at

the amount which would result as due from computation in accordance with the mandate of this court were sufficient to justify him in saying that he would not agree to the computation made by the representatives of the Government.

We therefore ask that the motion be overruled.

Respectfully submitted.

J. E. DODGE,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894–'95.

No. 622.

THE UNITED STATES

vs.

JOHNSON BLACKFEATHER, PRINCIPAL CHIEF, ETC.

Reply of Claimant's Counsel to Attorney General's Brief in Opposition to the Pending Motion.

Counsel submits that he withdrew his motion in Court of Claims for judgment on the mandate and order of the Supreme Court, and filed the motion for a modification of said mandate and order in this Court at the instance of Judge Nott, of the Court of Claims bench, who suggested from the bench, in open Court, the motion now here pending, and he also submits that this statement of his honor Judge Nott was made in the hearing and presence of the Attorney General's representative in that Court.

And until this objection it was believed by all parties interested that such a course would be of as much benefit to the Government as to the appellee in the case, and possibly more so.

It is still believed that "to reach an accurate conclusion the Court of Claims must consider portions of the original record and practically try the case *de novo*," and the pending motion to grant the Court of Claims such latitude, under this Court's opinion and judgment, as is necessary to "recompute the amount" from necessary sources is only in the interest of justice.

No harm certainly can come to the Government from this course. The Court of Claims can be safely trusted to do only what is clearly necessary to reform its judgment to meet the requirements of the opinion and judgment of this Court; but it must have a chance to do what this Court commands. As to whether "the scope of appellee's motion is not very apparent," we will submit to the judgment of this bench; and it is not thought that appellee's argument on his said motion will bear the construction that it is "addressed to the correction of alleged errors from which no appeal was taken." Neither is the question of the $66,000, mentioned in the Attorney General's brief, the occasion of dispute between counsel before the Court of Claims. There is no dispute about said sum. This matter is only an incident, and put in, as appellee's counsel there stated, merely to satisfy certain of the appellees; but appellee's counsel placed no reliance upon it, and there practically so stated.

The matters of dispute come clearly within the opinion and judgment of this Court, and the Court of Claims cannot recompute the amount due the Shawnees, in accordance with the opinion and judgment of this Court, *without taking up the original record*, and a *further call upon the executive departments may and probably will be necessary to absolute accuracy*.

It is *also* submitted that the Court of Claims should be allowed such latitude as will permit it to say that if the appellee is not entitled to the $10,506.39 item, as tribal funds, the Government shall pay said sum directly to the beneficiaries as originally contended by the Indian office, to which it must finally go in any event.

As to the Attorney General's objection that this Court has now no control of its mandate and order herein, we beg to submit, is not well taken.

We are within the term at which such order and mandate issued.

The "mandate and order" aforesaid is within the Court's jurisdiction, and "presumably" the Supreme Court *has control* over its mandates and orders, and there is not the least doubt in the world that the Court of Claims will be endowed with the power to "consider and grant an application of the appellee to try the case *de novo*," if the Supreme Court tells it to do so.

Appellee's counsel submits that the Supreme Court of the United States sometimes requires "lower courts" to try cases over, and this mandatory authority has never before been questioned.

In conclusion suffice it to say that it is a *desideratum* to carry out the act of Congress sending this case to the Court of Claims for trial *by ascertaining the true amount to which these people are justly entitled.*

This is what appellee's motion seeks to accomplish, nothing more, nothing less.

Respectfully submitted.

CHARLES BROWNELL,
Attorney for Appellee.